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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Nos. 332 and 333

BETTY KEVIN,
Petitioner,
vs.
MISSISSIPPI RIVER FUEL CORPORATION et al.,
Respondents.

ALLEGHANY CORPORATION et al.,
Petitioners,
vs.
MISSISSIPPI RIVER FUEL CORPORATION et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS

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MISSISSIPPI RIVER FUEL CORPORATION et al.,
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BRIEF FOR RESPONDENTS

Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., and James M. Kemper, Jr.

QUESTIONS PRESENTED.

While there was only one ultimate issue presented to the Court of Appeals, i. e., whether or not the holders of the Class B stock of the Missouri Pacific Railroad Company (Missouri Pacific) are entitled to vote separately

and as a class on the approval of any plan of consolidation of the Missouri Pacific with and into any other railroad corporation, it would appear that ten questions are presented to the Supreme Court in this proceeding. Four of them are preliminary, one going to the materiality of the alleged lack of merit of the proposed plan of consolidation, two going to the scope and basis of the Court of Appeals' decision, and one to the form of the proposed plan of consolidation.

Six are basic to petitioners' contention that they are entitled to a class vote on the proposed or any plan of consolidation. Each of such six basic questions must be answered in the affirmative, except the second (No. 6 below) which must be answered in the negative, if petitioners are to be sustained in their contention.

The four preliminary questions are:

1. Does the alleged unfairness of the proposed plan of consolidation have any bearing on the decision on any issue presented to this Court?

2. Did the Court of Appeals actually determine and apply the "applicable State law"?

3. Should this Court (a) defer to the decision of the Court of Appeals on matters of applicable State law, (b) make its own determination as to matters of applicable State law, or (c) refer the case back to the Court of Appeals for reexamination of these questions in the light of this Court's opinion?

4. Is the proposed plan a plan of consolidation within the scope of Sections 5 (2) and 5 (11) of the Interstate Commerce Act?

The six basic questions are:

5. Whether or not the language of Section D of Article VII of the Articles of Association of Missouri Pacific

is to be construed as providing for a class vote on any plan of consolidation, particularly one such as that proposed.

6. Whether or not Chapter 388, Missouri Revised Statutes 1959[1] (when read in the light of the relevant constitutional provisions), the chapter in which the Missouri General Assembly has expressed the State's public policy with respect to the incorporation, organization and powers of railroad corporations, is to be construed as the law of the State of Missouri applicable to the proposed plan of consolidation.

7. Whether or not Chapter 351, Missouri Revised Statutes 1959,[2] the chapter known as "The General and Business Corporation Law of Missouri," is to be construed as the law of the State of Missouri applicable to the proposed plan of consolidation.

8. Whether or not, if said Chapter 351 is to be construed as the law of the State of Missouri applicable to the proposed plan of consolidation, Section 351.270 of said chapter is to be construed as making any class voting provisions of Missouri Pacific's Articles of Association applicable to a consolidation plan, when Chapter 351 itself does not impose any such requirement.

9. Whether or not Section 5 (11) of the Interstate Commerce Act (sometimes hereinafter referred to as "Section 5 (11)"), which is plenary and exclusive and requires only a majority vote, defers only to the statutory law of the State of Missouri or to provisions in the Articles of Association which are merely permitted under the statutory law of Missouri.

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[1] Hereinafter sometimes referred to as "Railroad Corporation Law" or "Chapter 388."

[2] Hereinafter sometimes referred to as "Business Corporation Law" or "Chapter 351."

10. Whether or not Section 5 (11), which only provides that the "number" required by "applicable State law" shall assent to a plan of merger or consolidation, should be construed as deferring to any State law which might be held to require a class vote on a plan of consolidation of railroad corporations.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Statutes involved are:

(a) Sections 5 (2) and 5 (11) of the Interstate Commerce Act, 54 Stat. 905, 908 (1940), 49 U. S. C. A., §§ 5 (2) and 5 (11) set out in the Appendix, pp. 1a-2a to the Brief for Petitioner in No. 352.

(b) Sections 388.010, 388.020, 388.030, 388.040, 388.220, 388.290 and 388.300 of Chapter 388, Missouri Revised Statutes 1959, set out in their entirety in the Appendix to the Brief of Respondent Missouri Pacific at pp. 7a-18a, and Section 388.340 set out in the Argument below. The whole or relevant portions of certain of said sections are set forth in the Argument below.

(c) Sections 351.020, 351.270 and 351.458 of Chapter 351, Missouri Revised Statutes 1959, set out in their entirety in the Argument below; Section 351.230, 351.370 and 351.380 of said Chapter 351 set out in the Appendix hereto; Sections 351.090 and 351.430 of said Chapter 351 set out in the Appendix to the Brief for Respondent Missouri Pacific at pp. 1a-7a; and Sections 351.420, 351.425, and 351.690 set out in the Appendix to the Brief for Petitioners in No. 359, pp. 3a-5a.

(d) The following, set out in the Appendix hereto: Act of March 2, 1869, Laws of Missouri 1869, p. 75. Act of March 25, 1870, Laws of Missouri 1870, p. 24. Act of

March 26, 1881, Laws of Missouri 1881, p. 75. Revised Statutes Missouri, 1919, Section 10151. Act of April 1, 1921, Laws of Missouri 1921, p. 267. Act of July 13, 1933, Laws of Illinois 1933, p. 308, § 64 and paragraph (*c*) of § 72 (Illinois Business Corporation Act).

The Constitutional provisions involved are:

(a) Article XII, Sections 17 and 18 of the Constitution of Missouri of 1875, set out in their entirety in the Argument below.

(b) Article XI, Section 10 of the Constitution of Missouri of 1945, set out in its entirety in the Appendix hereto.

STATEMENT.

We do not deem it necessary to add to the Statement of the Case set forth in the Brief for Respondent Missouri Pacific, pages 4-12, to which reference is hereby made.

SUMMARY OF ARGUMENT.

I. Petitioners' ad hominem arguments with respect to the alleged unfairness of the proposed plan of consolidation are immaterial to any issue whatsoever presented to this Court. It is for the Interstate Commerce Commission to pass on the question as to whether or not the plan is "just and reasonable", and respondents submit that the responsibility for this decision should be left to the Commission, where it has been placed by Congress.

The explanation offered by Petitioner Levin for making such allegations—that they are being made solely to show that the plan would "alter and change class rights"—is not tenable. Any plan of consolidation, fair or unfair, will produce a change in form for all stockholders, since they will, of necessity, all receive certificates for shares of stock in a different corporation with different assets and different numbers and kinds of shares outstanding. The holders of the Class B stock are, of course, entitled to receive, in any plan of consolidation, new stock in the new corporation which will represent the full and fair equivalent of the entire bundle of rights represented by their present stock. Any plan which does not do this is not "just and reasonable" and will undoubtedly be disapproved by the Commission as not meeting the requirements of Section 5 (2) of the Interstate Commerce Act. The argument that the Class B stock is entitled to a separate class vote because the plan of consolidation is unfair and thereby changes their class rights is but another way of saying that such stock is entitled to vote as a class on any plan which is alleged to be unfair without a hearing by the Commission or by any court. The right of the holders of Class B stock to vote separately and as a class on any plan of consolidation is not to be tested by the fairness or unfairness of any proposed plan, but by the law.

II. Contrary to petitioners' contentions, the Court of Appeals did positively, flatly and finally state its conclusions and render its decisions on the issues as to the proper construction of the Articles of Association of Missouri Pacific and as to the applicable State law; nor is the decision of the Court of Appeals on these issues any less positive and definite simply because the Court was candid enough to admit that it had some difficulty in reaching these final decisions. The Court of Appeals carefully outlined the questions presented to it, set forth the arguments pro and con, and (R. 157) specifically held that Chapter 351, instead of Chapter 388, contained the applicable State law; that the Articles of Association do not call for a class vote on a consolidation; that even if they do, Section 351.270 does not call for a class vote; and that even if it does, a class vote is not "required" but is merely permitted by applicable State law. While the Court of Appeals looked to the national transportation policy and Section 5 (11) of the Interstate Commerce Act as an aid in resolving any doubts which it had, the fact remains that the Court of Appeals did construe Missouri Pacific's Articles, and did determine and apply what it deemed to be the applicable State law.

III. Petitioners not only contend that the Court of Appeals failed to construe Missouri Pacific's Articles and to determine and apply the applicable State law, but seek to avoid having these questions decided by any appellate court. Instead they ask this Court, without further examination of these questions, merely to adopt the decision of the District Court on the voting rights issue.

(a) Since the Court of Appeals did actually construe the Articles and determine and apply the applicable State law, this Court should, in accordance with its established policy, accept the decision of the Court of Appeals on matters of State law.

(b) On the other hand, if this Court determines not to accept such decisions of the Court of Appeals on these matters, or concludes that the decisions were not actually made, then the record is now before this Court, the issue is ripe for decision, and it should be decided by this Court so as to accomplish the purpose for which the case was certified under Section 1292b.

(c) If this Court should determine that the Court of Appeals erred in looking to the national transportation policy and the Federal law to aid it in arriving at its decisions on the State law questions, or misconstrued such national policy and Federal law, and if this Court should deem it inappropriate to correct such errors itself, if errors there be, then the case should be sent back to the Court of Appeals with instructions to reexamine and decide the State law questions in the light of this Court's opinion with respect to the applicable Federal law.

IV. Petitioner Levin contends that the proposed plan is not a plan of consolidation and is not within the scope of Section 5 (2) of the Interstate Commerce Act simply because it is a bad plan, the purpose of which is to deprive the Class B stockholders of their rights. The Court of Appeals correctly disposed of this contention with the statement (R. 157): "We hold that the proposed plan is one for a 'corporate consolidation' • • •." We suggest that this Court should do likewise.

V. Petitioner Alleghany says that "The class vote issue is now ripe for a determination by this Court."

In order to be successful on this issue, petitioners must be sustained on each of six separate propositions:

(1) That Missouri Pacific's Articles call for a class vote; (2) that Chapter 388 is not the applicable State law; (3) that Chapter 351 is the applicable State law; (4) that Section 351.270 makes the class voting provisions of

the Articles controlling; (5) that Section 5 (11) defers to provisions in articles which are merely permitted but not required under the applicable State law; and (6) that Section 5 (11) defers to any applicable State law requiring a class vote on a plan of consolidation.

If petitioners fail to be sustained on any single one of these propositions, then they must fail on the class vote issue, which they say is now ripe for a determination by this Court. The Court of Appeals ruled against petitioners on numbers (1), (4) and (5), for them on only (2) and (3), and did not reach (6).

A thorough examination of the language of Missouri Pacific's Articles is contained in the brief filed by Respondent Missouri Pacific, pages 38-47, to which reference is hereby made. In addition, a brief examination into the origin of these Articles will demonstrate that it could not have been intended by the Commission, the parties, or the courts to give to the Class B stock a veto power such as that which petitioners now claim.

These Articles came out of the reorganization proceedings of Missouri Pacific, which commenced in March of 1933 and did not terminate until twenty-three years later. Consistently over the years the Commission and the courts found that the common stock, now represented by the Class B stock, had absolutely no value. Petitioner Alleghany was an active participant in such reorganization proceedings, and fought vigorously against any wiping out of the common stock. The original capitalization proposed for the new company was only $560,000,000. Finally, in desperation, and in order to bring the proceedings to a conclusion, it was determined to allot $4,000,000 par value of Class B stock to the old common stockholders, of which Alleghany then owned nearly 50%. In order to produce capital to support this Class B stock (as well as the Class A stock) it was necessary to increase the total cap-

italization of the system to $809,200,000, an increase of nearly $250,000,000 over the original plan.

The holders of the old common stock asked the Commission to use its discretion and increase the voting power of the Class B stock from 2% to 4% of the total voting power. The Commission refused, saying that "the doubling of the voting power that would result, we believe, would be inequitable." Since the Commission thought it would be inequitable to have the Class B stock given as much as 4% of the total voting power, it is inconceivable that the Commission would have approved giving them the absolute veto power which they now claim. When some of the parties complained of the proposed plan on the ground that "It also carries rights of veto which will enable its owners to pry further concessions from other security holders" Alleghany filed a reply brief (R. 81) saying that

> "Except in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital, both of which appear to be impractical for railroad companies, *there would appear to be no veto at all.*"[3]

Thus, in persuading the Commission, the court and the parties to issue the Class B stock, Alleghany was denying the existence of the veto power which it now asserts.

VI. The public policy of the State of Missouri from the very beginning has been to encourage the construction, extension, combination and uniting of lines of railroad, both within and without the State, whether by technical corporate consolidation or by any other kind of legal transaction. This public policy is now expressed in Chapter 388, of which those sections that are most pertinent

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[3] Emphasis ours here and throughout this brief, except where otherwise indicated.

were originally enacted in 1870, and have remained substantially unchanged ever since. The general pattern of Missouri law for one hundred years has kept those statutes dealing with railroad corporations separate and distinct from those dealing with other types of corporations, particularly manufacturing and business corporations. Separate codes have developed for railroad companies and for business companies which have been amended separately in different ways, and at completely different times.

Just as the codes for railroad corporations and manufacturing and business corporations were separate, the merger and consolidation provisions of the two codes were completely different, those applicable to railroad corporations being much more liberal than those applicable to manufacturing and business corporations; and the latter by express statutory provisions were limited so that they did not and could not apply to railroad corporations.

In 1943 the Missouri General Assembly enacted The General and Business Corporation Law of Missouri, now Chapter 351, Missouri Revised Statutes 1959. It was the deliberate intention of the General Assembly to restrict its revision to the laws dealing with manufacturing and business corporations and to limit narrowly the effect of the revision on the codes governing other types of corporations.

A detailed examination of the language of the most significant sections of Chapter 388 which were enacted in 1870 discloses that they were inartificially drafted, that at times they used the terms "consolidate" and "consolidation" in the technical corporate sense, and at other times in a broad general sense and as synonymous with combining, uniting or amalgamating railroad lines by any appropriate legal means, including by purchase and sale. This construction of such sections of Chapter 388 is confirmed by the language of the Missouri Constitution of

1875, which was carried over into the Missouri Constitution of 1945, where it speaks of domestic and foreign railroad corporations which shall "consolidate, by sale or otherwise". So construed, Chapter 388 authorizes the consummation of the proposed plan of consolidation by a majority vote only, and without any separate class vote. But even if chapter 388 should be literally and narrowly construed so as not to authorize the proposed plan of consolidation, nevertheless it does clearly and unequivocally set forth the public policy of the State of Missouri that nothing more than a simple majority vote should be required to approve any consolidation of railroad companies and is the applicable State law to which Section 5 (11) defers.

That the construction which we have placed on Chapter 388 is correct is confirmed by the fact that dozens and perhaps one hundred or more consolidations between domestic and foreign railroad corporations have been consummated; that the authority to do so has never been directly challenged, although such authority is recognized in a number of court decisions, State and Federal; and that if Chapter 388 did not and does not authorize a plan of consolidation such as the proposed one, then none of such consolidations could have been accomplished under the provisions of Chapter 351 and its predecessors. If Chapter 388 does not apply, and, as we shall point out below, Chapter 351 did not and does not apply, then there is no "applicable State law" in Missouri, and Section 5 (11) of the Interstate Commerce Act is the sole authority for the proposed plan.

VII. Prior to July 18, 1961, the consolidation provisions of Chapter 351, and its predecessors, were of limited application and railroad corporations were specifically excluded therefrom. By an amendment approved July 18, 1961, Section 351.458, the section upon which petitioners rely, and must rely, was added. But this section was

enacted for the specific purpose of correcting a defect in the statutes applicable to manufacturing and business corporations, and with no thought or suggestion that it might affect railroad corporations. An examination of the language of Section 351.458, and the related sections of Chapter 351, will demonstrate that they do not supplement, but are inconsistent with, or in conflict with the purposes of, and are in derogation or limitation of the existing laws applicable to railroad corporations, and hence, in accordance with the provisions of Section 351.690 (3), are not the law of the State of Missouri applicable to the proposed plan of consolidation.

VIII. Even if Chapter 351 be construed as the State law applicable to the proposed plan, nevertheless, Section 351.270 of said chapter does not refer to charter provisions providing for class voting when none is required by the chapter.

Section 351.270 is a section which does nothing more than provide that if corporations coming within the provisions of Chapter 351 (and railroad corporations do not) include in their articles of association provisions requiring a greater number or percentage of votes to authorize any particular corporate action than the number or percentage of votes required by the chapter with respect to such action, then the number or percentage specified in the articles shall govern. Its scope and effect is limited to those actions where the chapter requires a certain vote, and is limited to provisions in the articles calling for a larger vote than that so required. This would apply to class voting where the chapter requires, and only where the chapter requires, class voting, namely, on amendments to the articles. It does not apply to consolidations, where the chapter makes no provision for a class vote.

This section was copied verbatim (except for the addition at the end of the incomprehensible words "this sec-

tion") from the Illinois Business Corporation Act, the source of much of the Business Corporation Law of Missouri. But in adopting much of the Illinois Law, Missouri expressy rejected the provisions of the Illinois Law which provided for class voting on the approval by shareholders of mergers and consolidations. To construe Section 351.270, as petitioners seek to have it construed and must have it construed if they are to be entitled to class voting, it is necessary to ignore the deliberate act of the Missouri General Assembly in rejecting class voting on mergers and consolidations.

IX. Section 5 (11) of the Interstate Commerce Act defers only to the different vote, if any, which may be "required under applicable State law". The word "law" as used in the quoted phrase is used in the same sense as that in which the words "laws" and "law" are used later on in the same Section 5 (11), i. e., as statutory law. Congress is deferring to the public policy of the States as expressed by the statutory laws of the States, not to the provisions of private contracts. And by the use of the word "required" Congress was referring only to those provisions of the laws of the States which require a greater than majority vote and not to those which merely permit stockholders of a corporation to agree among themselves for a greater than majority vote.

X. The use of the word "number" in Section 5 (11) makes it clear that the section should not be construed as deferring to a State law requiring a class vote on a plan of consolidation of railroad companies, but only to a State law requiring a vote greater in number than a majority vote.

ARGUMENT.

I.

The alleged unfairness of the proposed plan of consolidation has no bearing on the decision on any of the issues presented to this Court.

In spite of petitioners' efforts in the District Court, in the Court of Appeals, and now in this Court, for whatever reason, to inject into the case an issue as to the alleged unfairness of the proposed plan, the question as to whether or not the proposed plan is fair and reasonable is not before this Court. That issue will eventually be determined, presumably correctly, by the Interstate Commerce Commission, the agency to which Congress has given jurisdiction to pass on just such questions, and which has the expertise to do so. The decision will be made after a full hearing at which petitioners will have the right to attempt to support their charges, and it will be subject to the right of appeal, eventually to this Court. Respondents are not only willing but anxious to submit the question as to the fairness of the plan to the Commission's judgment, a result which petitioners seem to wish to avoid.

Since the District Court decided only the voting rights issue and reserved decision on all other points, there was but a single ultimate issue presented to the Court of Appeals for its decision, namely:

> Whether or not the separate vote and assent of the holders of a majority, or some greater percentage, of the outstanding shares of the Class B stock of Missouri Pacific, voting separately as a class, is required for the approval of *any* proposal for *any* merger or consolidation of Missouri Pacific with or into any other railroad company?

We say *any* proposal for *any* merger or consolidation. It is, of course, true that the issue is now presented by the particular plan of consolidation which is being attacked in this particular litigation as being grossly unfair and inequitable with respect to the Class B stock.

Petitioners Alleghany et al., charge that the impact of the plan upon the Class B stockholders would be "disastrous" (Alleghany Br. p. 8),[4] but nowhere in their Brief do they follow this statement up to show what bearing such fact, even if we assume it to be a fact, has upon any issue presented to this Court.

Petitioner Levin charges that "the purpose and substance of the proposal are to enrich the majority * * * by stripping the common stockholders of their legal rights and equity" (Levin Br. p. 3); that Mississippi attempts to "appropriate" the Class B's property and rights and that the proposal would "strip" the Class B stockholders of their special rights (Levin Br. p. 4); that the impact upon the Class B's share in Missouri Pacific's earnings would be "disastrous" (Levin Br. p. 10); and that the Class A stockholders would "appropriate to themselves" (Levin Br. p. 11) the vast earnings that are claimed to now belong to the Class B stockholders.

And yet, having made this ad hominem argument, petitioner Levin admits (Levin Br. p. 15) that the question as to whether the plan is "just and reasonable" is not in issue, and professes to be seeking merely to "demonstrate that the proposed plan would alter and change class rights". But the argument that the effect of the plan would be to change adversely the rights of the holders of the Class B stock is just another way of saying that the plan is a bad plan—that they are entitled to a separate class vote on this particular plan because it is unfair.

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[4] Reference to the Brief filed in No. 359 by Alleghany Corporation, Rose Slayton, *et. al.*, will be denoted "Alleghany Br.," and to the Brief filed in No. 352 by Betty Levin as "Levin Br."

There is not the slightest doubt about the fact that in any plan of merger or consolidation of the Missouri Pacific the Class B stockholders are entitled to receive the full, fair and complete equivalent of the entire bundle of rights represented by their stock. If they do not, the plan is not "fair and reasonable" and does not meet the test of Section 5 (2) of the Interstate Commerce Act. But the decision as to whether or not the plan is fair and reasonable was not made and could not be made by the District Court; was not made and could not be made by the Court of Appeals; and should not be made at this time by this Court. Instead, the sole jurisdiction over the fairness of the plan is specifically vested in the Interstate Commerce Commission, 49 U. S. C., § 5, subject to review by a three-judge District Court, 28 U. S. C., §§ 1336, 2321-2325, 2284, with direct appeal to this Court pursuant to 28 U. S. C., § 1253. Not only is jurisdiction over consolidation and mergers given to the Commission, but in 49 U. S. C., § 5 (11) it is specifically provided that "The authority conferred by this section shall be exclusive and plenary * * *." See *Schwabacher v. United States*, 334 U. S. 182 (1948); *Neisloss v. Bush*, 293 F. 2d 873 (D. C. Cir. 1961); *General Inv. Co. v. New York Cent. R. Co.*, 23 F. 2d 822 (6th Cir. 1928); *Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Jackson*, 22 F. 2d 509 (6th Cir. 1927).

There is nothing in the language of the Articles of Association of Missouri Pacific and nothing in any statute which gives to the Class B stock of Missouri Pacific a class vote on an unfair plan of merger or consolidation, but deprives them of a class vote on one which the Commission finds to be fair and reasonable. If they are entitled to a separate class vote they are entitled to vote as a class on *any* plan of merger or consolidation, and if they are not entitled to a separate class vote on a fair and reasonable plan, then they are not entitled to a class vote upon the particular plan before the Court simply because they charge

that it is unfair and unreasonable. What the petitioners are actually seeking is an absolute veto on any plan—the unrestricted right to decide for themselves what plan will be submitted to the Commission and which the Commission will not even get an opportunity to pass on. Accordingly, since the issue as to the fairness of the proposed plan is not now before this Court, the merits of the plan, or lack of merits, are immaterial to the decision of any issue presented to the Court.

II.

The Court of Appeals actually determined and decided the issues with respect to the proper construction of the Articles of Association of Missouri Pacific and the applicable Missouri law.

Petitioners contend that the Court of Appeals failed to construe the Articles of Association of Missouri Pacific and failed to determine and apply the applicable Missouri law. We submit that the Court below did positively, flatly and finally state its conclusions and rendered its decisions on such issues in the following language (R. 157):

> "In summary, and in repetition: We hold that the proposed plan is one for a 'corporate consolidation' and that the parenthetical material of § 5 (11) is applicable. We conclude that a majority of all voting shares in the aggregate is the general standard and that the statute bows in the direction of state law only with its phrase beginning with 'unless'. We also conclude that chapter 351 has application to the proposed plan. But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something 'required under applicable State law'. In our view, the

> Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them."

When this language is examined in the light of the Court's own formulation of the questions presented to it, it will show that the Court of Appeals, in addition to its decision that the proposed plan is one for a corporate consolidation and its decision with respect to the applicability and meaning of § 5 (11), made the following specific decisions as to the proper construction of the Articles of Association of Missouri Pacific and as to the applicable Missouri law:

First, that Chapter 351, instead of Chapter 388, has application to the proposed plan.

Second, that Missouri Pacific's Articles do not call for a class vote on a consolidation.

Third, that even if Missouri Pacific's Articles do call for a class vote on a consolidation, Section 351.270 by its reference to the Articles does not demand a class vote. (This is an answer, in the negative, to the Court's own formulation (R. 154) of the ultimate issue as to whether Section 351.270 "operates to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement.")

Fourth, by phrase (c) in the portion of its opinion quoted above, that even if it be assumed that Missouri Pacific's Articles do call for a class vote on a consolidation, and if it be assumed that § 351.270 does operate to make any class voting provisions of Missouri Pacific's Articles applicable to a consolidation plan when the Missouri consolidation statute does not impose that requirement—nevertheless class voting is not "required" but merely permitted under that State law. Again this is an

answer to the question as formulated by the Court (R. 155), which was:

> "If, however, it be assumed that § 351.425 and § 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and if it be further granted that MoPac's Articles call for a class vote on consolidation, * * *"

and if the Articles as such be held by the Court to be "State law," then

> "is class voting then 'required' or merely permitted under that state law?"

Nor is the determination of the Court of Appeals on these issues any less positive simply because the Court was candid enough to admit that it had difficulty in reaching its final conclusions.

It is perfectly true that in resolving any doubts which it had with respect to the proper construction of Missouri Pacific's Articles and the applicable statute of the State of Missouri, the Court of Appeals, as it stated, took into consideration the significance of the national transportation policy and its emphasis upon railroad consolidation, together with the stated exclusive and plenary character of Section 5 (11) of the Interstate Commerce Act, with its consequent preemptive nature, and made its decisions against such background. Nevertheless, the Court of Appeals did construe Missouri Pacific's Articles, did decide that Chapter 351, not Chapter 388, has application to the proposed plan, did decide that Section 351.270 does not operate to make any class voting provisions of Missouri Pacific's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement, and did decide that even if Section 351.270 does defer to Missouri Pacific's Articles so far as a consolidation is concerned, and even if Missouri Pacific's Articles do call for a class vote on con-

solidation, and even if the Articles as such be held to be "State law", nevertheless class voting is not "required" but merely permitted under Missouri state law.

III.

This Court should either (a) accept the decisions of the Court of Appeals on matters of State law, or (b) examine Missouri Pacific's Articles and the applicable State statutes and Constitutional provisions and render its own decisions on the questions of State law presented on this record, or (c) send the case back to the Court of Appeals for determination of the State law questions in the light of this Court's opinion.

(a) This Court should accept the decisions of the Court of Appeals on matters of State law.

If, as we contend, the Court of Appeals actually did construe Missouri Pacific's Articles, and did determine and apply the applicable State law, then we submit that this Court should follow its practice of accepting the decisions of Courts of Appeals on matters of State law. *Propper v. Clark*, 337 U. S. 472, 487 (1949); *Richards v. United States*, 369 U. S. 1, 16 (1962); *United States v. Durham Lumber Co.*, 363 U. S. 522, 526-527 (1960); *Byrd v. Blue Ridge Coop.*, 356 U. S. 525, 529-530 (1958).

(b) If this Court determines not to accept the decisions of the Court of Appeals or concludes that the decisions were not actually made, it should examine Missouri Pacific's Articles and the applicable State statutes and Constitutional provisions and render its own decisions on the questions of State law presented on this record.

Petitioner Alleghany suggests (Alleghany Br. pp. 26-27) that even though they admit that "The class vote issue is now ripe for a determination by this Court" this Court

should not "take on the added burden of examining the charter provisions and the Missouri State law and of rendering a decision on the questions of State law presented on this record." Instead, they ask this Court merely to affirm, without examination, consideration or determination, the decision of the District Court, as to which decision the District Court said "There is a substantial ground for difference of opinion" and certified it under Section 1292b, 28 U. S. C. (R. 103).

In other words, they say that the Court of Appeals, having granted to the respondents permission to take an appeal on the issue which the District Court felt should be decided by the Court of Appeals and, as they say, the Court of Appeals not having decided the issue presented to it, the issue should now be resolved against respondents by default and without decision either by the Court of Appeals or by this Court.

If, contrary to respondents' contention, this Court should hold that the Court of Appeals did not decide the questions as to applicable State law, then the record presenting these issues is now before this Court, the class vote issue is, as Petitioner Alleghany says, "ripe for a determination by this Court" and should be decided by the Court so as to materially advance the ultimate termination of the litigation.

(c) If this Court should conclude that the Court of Appeals decided the questions of applicable State law but, in doing so, improperly relied upon or erroneously construed Federal law, then this Court should send the case back to the Court of Appeals for determination of the State law questions in the light of this Court's opinion with respect to the applicable Federal law.

Petitioners contend that the Court of Appeals either failed to decide the questions as to applicable State law, or, if and to the extent it did so, improperly relied upon

the national transportation policy and Federal law in making such decisions and, in addition, misconstrued and misinterpreted the national transportation policy and Federal law.

We have pointed out above that the Court of Appeals actually did decide the questions of applicable State law presented to it. We concede that the Court of Appeals looked to the national transportation policy and to Federal law in resolving its doubts, but contend that it had a right to do so.

As for the correctness of the Court of Appeals' interpretation of the national transportation policy and Federal law, these matters will be discussed very briefly below and more thoroughly in the brief being filed by Respondent Missouri Pacific, to which reference is hereby made.

But if it should be determined that the Court of Appeals was in error in looking to the national transportation policy and the Federal law and/or misconstrued such policy and law, then the error should either be corrected by this Court, as suggested above, or the case should be sent back to the Court of Appeals so that it may have an opportunity to correct its error in the light of this Court's opinion. The error, if error there be, should not be left uncorrected by either this Court or by the Court of Appeals with the result that the very purpose for which the case was certified by the District Court and the appeal accepted by the Court of Appeals would be thwarted.

As this Court said, in the case of *Bank of America v. Parnell*, 352 U. S. 29 34 (1956), in reversing a decision of a Court of Appeals in a somewhat similar situation, although the facts and the issues were entirely different:

> "This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Ap-

peals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court to review the judgments of the District Court in the light of the controlling state law. The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard."

To the same effect see *National Labor Relations Board v. Walton Manufacturing Co.*, 369 U. S. 404 (1962); *Jaffke v. Dunham*, 352 U. S. 280 (1957).[5]

IV.

The proposed plan is a plan of consolidation within the scope of Sections 5 (2) and 5 (11) of the Interstate Commerce Act.

Petitioner Levin contends (Levin Br. pp. 34-36) that the proposed plan is not within the scope of Section 5. (2) of the Interstate Commerce Act because, petitioner says (p. 35), the true purpose and substance of the plan are "to strip the Class B stockholders of their valuable legal rights and property for the enrichment of the Class A, particularly Mississippi". Petitioner relies upon *County of Marin v. United States*, 356 U. S. 412 (1958), and

[5] In the alternative, if this Court should deem it appropriate to have an authoritative decision of the Supreme Court of Missouri on any of the State law questions, since there has been no such decision, this case might be remanded to the District Court with instructions to have any such question or questions properly presented to the State courts of Missouri. See *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639 (1959); *Leiter Minerals, Inc. v. U. S.*, 352 U. S. 220 (1957); *Shipman v. Dupre*, 339 U. S. 321 (1950); *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940).

Wood v. United States, 132 F. Supp. 586 (S. D. N. Y. 1955).

There is no conflict with *County of Marin*. As the Court of Appeals properly pointed out, *County of Marin* actually held that the Commission did not have jurisdiction of the proposed transaction there in issue because it was not, in fact, an "acquisition" but was in fact a "split up". This Court did not there undertake to examine into or decide any question as to whether or not the purpose or motive behind the transaction was an improper one, as petitioner Levin asks the Court to do here.

The *Wood* case was a proceeding under the provisions of 49 U. S. C., Section 20b, for the modification of railroad securities and had nothing whatsoever to do with mergers, consolidations or Section 5 (2) of the Interstate Commerce Act, and is not applicable.

V.

The language of the Articles of Association of Missouri Pacific does not require the separate vote and assent of the holders of a majority, or some greater percentage, of the outstanding shares of Class B common stock of Missouri Pacific, voting as a class, on any proposal for the merger or consolidation of Missouri Pacific with or into any other railroad company, and, more particularly, a merger or consolidation in which the Missouri Pacific shall not be the surviving corporation.

Petitioner Alleghany says (Alleghany Br. p. 26) that "The class vote issue is now ripe for a determination by this Court." In order to be successful on this issue, petitioners must be sustained on each of six separate propositions:

(1) That Missouri Pacific's Articles call for a class vote; (2) that Chapter 388 is not the applicable State law; (3) that Chapter 351 is the applicable State law; (4) that

Section 351.270 makes the class voting provisions of the Articles controlling; (5) that Section 5 (11) defers to provisions in articles which are merely permitted and made controlling but not required under the applicable state law; and (6) that Section 5 (11) defers to any applicable State law requiring a class vote on a plan of consolidation.

If petitioners fail to be sustained on any single one of these propositions, then they must fail on the class vote issue which they say is now ripe for a determination by this Court. The Court of Appeals ruled against petitioners on numbers (1) (4) and (5) and did not reach number (6).

Article VII Section D of the Articles of Association of Missouri Pacific grew out of and was adopted at the conclusion of the Reorganization Proceedings of Missouri Pacific. In order to get a clear understanding of the attitude of the Commission and of the courts toward the old common stockholders of Missouri Pacific, the circumstances under which the Class B stock was issued to such old common stockholders, and the intention of the parties, the Commission and the courts with respect to the rights, powers and limitations intended to be given to both the Class A and the Class B stock, brief examination of such Reorganization Proceedings is called for. It will, we believe, aid in the construction of the language—not only the language which was actually used but that (with respect to mergers and consolidations) which was omitted.

(1) An examination of the published reports of the Commission and decisions of the Courts in the Reorganization Proceedings of the Missouri Pacific will demonstrate that it could not have been intended in the plan of reorganization to give to the holders of the Class B stock a veto power such as that now claimed by petitioners.

The Reorganization Proceedings of Missouri Pacific were commenced in the United States District Court for

the Eastern District of Missouri in March of 1933 and terminated twenty-three years later in March of 1956. The reorganization was the subject of nine separate reports by the Interstate Commerce Commission, aggregating over 750 pages, which comprehensively analyzed all aspects of Missouri Pacific's operating finances and corporate structure. These reports were the subject of six reported opinions of the District Court, five opinions of the Court of Appeals, in two of which certiorari was applied for and denied, and one extensive opinion of the Supreme Court, all of which thoroughly reviewed the Commission's findings. More Commission reports, more District Court opinions, and more Court of Appeals opinions were written in the Missouri Pacific reorganization than in any other railroad reorganization.

Missouri Pacific filed its debtor's petition in the District Court on March 31, 1933. The matter was referred to the Commission where extensive hearings were held, and in 1940 the Commission issued its Report and Supplemental Report approving the first plan of reorganization, which provided a total capitalization of Missouri Pacific of some $560,000,000. *In re Missouri Pacific R. Co.*, 39 F. Supp. 436, 440, 444.

In this first Plan of Reorganization no securities were allocated to either the preferred or common stockholders of Missouri Pacific. The reasons given by the Commission were:

> (a) "the indebtedness prior to its preferred and common stock cannot be satisfied in full", and
>
> (b) "a consideration * * * from the standpoint of earnings available for payment of dividends also shows that those equities have no value." *Missouri Pacific R. Co. Reorganization*, 239 I. C. C. 7, 131.

In due course the District Court approved this first plan of reorganization, 39 F. Supp., l. c. 450, but in 1943 the

District Court referred the plan back to the Commission for further consideration. *In re Missouri Pacific R. Co.*, 50 F. Supp. 936, 943.

In 1944 the Commission issued its Second and Third Supplemental Reports approving a second Plan of Reorganization in which the total capitalization remained at $560,000,000. *In re Missouri Pacific R. Co.*, 64 F. Supp. 64, 67-68. The District Court pointed out, l. c. 70, that the Commission had found "that the stockholders have no equity, and consequently must be excluded from participation." The District Court approved this second Plan of Reorganization, saying, l. c. 70:

> "Further, it [the Commission] felt that, in view of the impossibility of providing substantial satisfaction of junior creditors within proper capitalization, *it would be inequitable to offer anything at all to stockholders.* The Court is in full accord on this holding, since it appears elementary and contrary to equity to give anything to stockholders so long as unsatisfied creditor claims exist."

On appeal, the Court of Appeals affirmed the judgment of the District Court. *Comstock v. Group of Institutional Investors, Inc.*, 163 F. 2d 350 (8th Cir. 1947); *New Orleans, T. & M. Ry. Co. v. Group of Institutional Investors*, 163 F. 2d 358 (8th Cir. 1947), both affirmed in 335 U. S. 211 (1948).

After the Court of Appeals had affirmed the decision approving the second Plan of Reorganization, the Commission filed with the Court of Appeals a memorandum indicating that the plan had become obsolete because of substantial debt retirements and large accumulations of cash which had resulted from the war earnings. *In re Missouri Pacific R. Co.*, 93 F. Supp. 832, 840. The Court thereupon vacated the District Court's order approving the plan and remanded the cause to the District Court

"with directions to return the plan to the Interstate Commerce Commission for its further investigation, consideration and recommendation." *Wright v. Group of Institutional Investors,* 163 F. 2d 1022 (8th Cir. 1947). Thereafter, after further hearings in 1949 the Commission issued its Fourth and Fifth Supplemental Reports approving a third Plan of Reorganization, which increased the total system capitalization to approximately $612,000,000. *In re Missouri Pacific R. Co.,* 93 F. Supp. 832, 839. Missouri Pacific's former common stockholders were still excluded. The District Court approved this third plan of reorganization, 93 F. Supp., l. c. 854, and in connection with the treatment of Missouri Pacific stockholders said, l. c. 850-51:

> "Their contention that the Commission should have increased the allowed capitalization has been denied.
>
> "The Missouri Pacific Common stock was excluded, the Commission finding that the equity of the common stock had no value. * * * It is impossible to find that the common stock has any equity. The Commission's finding of 'no value' is based on material evidence and is affirmed."

On appeal this decision was affirmed. *State of Texas v. Group of Institutional Investors,* 191 F. 2d 265 (8th Cir. 1951), cert. den. 342 U. S. 904, 918, 929. The Court of Appeals said, l. c. 273-274:

> "Whether or not there was an equity in the common stock was for the Commission and the trial court did not err in approving its action.
>
> "As of January 1, 1951, there were $282,045,385 of arrears in interest on the Missouri Pacific claims and dividends on the old Missouri Pacific Preferred Stock. The old common stock has not received a dividend since the company came out of the reorganization in 1917. There is no sound basis for a finding that the common stock has value * * *."

In November, 1952, after this Court had denied certiorari in the foregoing case, a petition was filed with the Commission, pursuant to 11 U. S. C., Section 208 (a), and the Commission reopened its proceedings. *In re Missouri Pacific R. Co.*, 129 F. Supp. 392, 396; *Missouri Pacific R. Co. Reorganization*, 282 I. C. C. 629, 687-688. And in February of 1954 an Examiners' Proposed Report was issued recommending substantial modifications and changes in the third (1949) Plan of Reorganization. *In re Missouri Pacific R. Co.*, 129 F. Supp. 392, 396.

Meanwhile, the Trustee of the debtor, pursuant to an order of the District Court, offered his services and cooperation with the parties to these proceedings in an effort to aid them in composing their differences with respect to a plan of reorganization, so that a final reorganization of the debtor companies might be expedited. As a result of extended negotiations, a Stipulation and Agreement was signed by a large majority of the parties in interest approving what was called an "Agreed System Plan". 129 F. Supp., l. c. 396.

This Agreed System Plan provided for a total capitalization of approximately $809,200,000, an increase of nearly $250,000,000, or 44% over the original 1949 plan. This vast increase in capitalization was necessary if even $4,000,000 worth of equity was to be found to support the Class B stock and to justify alloting this miniscule interest in the new company to the old common stockholders.

The Commission found that on the basis of its adjusted estimated average earnings of some $57,500,000 available for fixed charges and federal income taxes at 45%, the reorganized company would earn $5.68 per share on the Class A Stock after the 2½% capital fund and sinking fund, and that such earnings seemed reasonable. *Missouri Pacific Railroad Co. Reorganization*, 290 I. C. C. 477, 588.

And it was only upon the theory that the claim of the preferred stockholders would be satisfied in full, and that possible increase in railroad earnings in the future might create some value over and above that allocated to the preferred stock, that the Commission gave any recognition to the common stock at all. The Commission said, l. c. 565-566:

> "The evidence of the possibility of the increase of system earnings is such that immediate recognition of a moderate value in the equity of the old common stockholders seems reasonable under such circumstances. Recognition of such equity to the limited extent provided in the agreed plan would not necessitate their participation in earnings before the management felt that this was justified in the light of earnings and corporate requirements."

Thus the Commission recognized and intended that the Class B Stock should only participate in possible future earnings if and to the extent that the management, elected by the Class A Stock, might see fit to grant such participation.

But even more significant, as an indication of the Commission's attitude toward the voting power which it intended to give to the Class B stockholders, is the statement found in the Commission's answer to the objections of the common stockholders' committee, where the Commission said, 290 I. C. C., l. c. 599:

> "The Missouri Pacific common stockholders committee alludes to the large per-share earnings on this stock and contends that, because of the reduction in number of shares outstanding, the public market will be destroyed and holders will be able only to sell their scrip and odd lots wherever they can find a buyer. It foresees a public distribution of less than 22,000 shares since it says that 19,600 shares will go to a

single holder. It points out that the plan would vest the equity in a class of stock having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent. To protect the public holders of the Class B stock, the committee requests recognition of them as a separate class, by the issue to them of new stock on a share-for-share basis. The circumstances recited by the committee do not, in our opinion, justify the recognition of the public holders of the new Class B stock as a separate class of security holders. Some relief would be accorded them by approval of the issue of the larger number of shares of $50 stated value stock, *but the doubling of the voting power that would result, we believe, would be inequitable.* The agreed plan provides 1 vote for each share of Class B stock."

Thus the Commission, while recognizing the problem pointed out by the committee, specifically refused to increase the voting power of the Class B Stock from approximately 2% to something less than 4% of the total voting power. It held that it would be "inequitable" to give the Class B stockholders as much as a 4% vote in matters affecting the control and welfare and operation of the railroad. And yet petitioners now contend that the Commission intended to give to just one-half of the Class B stockholders a complete veto over any merger or consolidation of the Missouri Pacific, no matter how vital such merger or consolidation might be to the interests of the railroad, its creditors and the public.

Commissioner Mahaffie concurred in the result, "with grave misgivings," only because of the long delay in the reorganization. He said (pp. 624-625):

"Another serious defect is the proposed 'B' stock. This is intended to give recognition to the old common. *That common has, at most, only a nuisance*

> *value if the claims prior to it are to be fully met.* * * * But the 'B' stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the 'A' stock and to the debentures and income bonds which precede it is *reasonably sure to cause trouble.*"

The District Court in due course approved the Agreed System Plan. *In re Missouri Pacific R. Co.*, 129 F. Supp. 392.

This decision was appealed to the Court of Appeals and in the case of *Missouri Pacific Railroad Co. 5¼% S. S. B. C. v. Thompson*, 225 F. 2d 761 (8th Cir. 1955), the Court of Appeals affirmed the decision below.

In view of the above, we submit that it is inconceivable that it could have been intended in the Agreed System Plan to give to Missouri Pacific's old common stockholders, now the Class B stockholders, who had at the most only a possible future equity in the debtor corporation, a veto power such as the one now claimed, or that, if such had ever been intended, the Agreed System Plan would have ever been accepted by the parties and approved by the courts. And this is true even without giving consideration to the public policy of the United States to facilitate the consolidation of the national transportation system discussed in the Brief of Respondent Missouri Pacific.

(2) Alleghany Corporation has construed the language of the Articles of Association as not giving to the Class B stock a veto power such as that now claimed.

In the Levin brief filed herein the Court's attention is called to an excerpt from a petition for leave to intervene filed by the Missouri Pacific in 1961 with the Commission, and the contention is made that this excerpt indicates that the Missouri Pacific has previously taken a position

contrary to what it now states.[6] Interestingly enough this contention is found only in the Levin brief in this Court, although, as the Court of Appeals stated (R. 158), this is one of the contentions that the Court said was made by "each side" and it was Alleghany's brief there that made this particular complaint. Perhaps the reason for the shift in the sponsorship in this contention is found in the fact that Alleghany has itself taken an inconsistent position twice.

When the final Agreed System Plan was before the District Court, the Group of Institutional Investors in its brief objected to the proposed capitalization, saying:

> "After the postponement of the exercise of rights of creditors for more than 21 years, the Commission, in an attitude of hopelessness, adopted the unsound 'agreed system plan' made between creditors and the stockholders. When this agreement was reached these proceedings had come to a state of almost complete frustration. In such circumstances the stockholders had a bargaining power entirely disproportionate to their interest in the property. The agreed system plan, in its treatment of the First and Refunding bondholders and the common stockholders of the Missouri Pacific, reflects this bargaining power. Section 77 conferred broad powers on the Commission to prevent the consummation of plans of reorganization of the kind now before the Court. The proposed new Class B stock, although only a small fraction of the new cap-

[6] It is charged (p. 25) that the respondents and (p. 29) that Missouri Pacific and Mississippi took this position. But the fact is that neither Mississippi nor any of the respondent directors participated in this proceeding nor was Mississippi in control of Missouri Pacific at the time, having only started to acquire stock of Missouri Pacific in 1959, as expressly pointed out in the Levin Brief, page 8. Whatever position Missouri Pacific may or may not have taken in 1961, it was not then and is not now binding upon these respondents.

italization carries voting rights. *It also carries rights of veto which will enable its owners to pry further concessions from other security holders.* No new equity capital or debt capital convertible into equity capital may be obtained without the permission of the owners of this minuscule voting interest (R. 35202). Thus is nuisance value recognized and preserved" (R. 80-81).

In answer to these objections Alleghany Corporation, in its Reply Brief, then said:

"The Group's Brief then states that the Class B stock 'carries rights of veto which will enable its owners to pry further concessions from other security holders.' Except in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital, both of which appear to be impractical for railroad companies, *there would appear to be no veto at all*" (R. 81).

Thus Alleghany Corporation was denying that the Class B Stock would give it the very veto power which it now asserts. And this denial by Alleghany Corporation was in the proceedings in the District Court wherein Alleghany Corporation was seeking to get the District Court to approve the plan giving to it approximately one-half of the Class B Stock, and succeeded in its effort.

Thereafter in its Annual Report for 1961, issued in the spring of 1962 (R. 76), after reviewing its investment in the Missouri Pacific and describing the rights of the B Stock and the possibilities which it offered and what voting power they had on the issuance of new securities, said:

"The vote of Alleghany's Missouri Pacific Class B stock is necessary to any merger, consolidation or other type of amalgamation *requiring the issuance of additional Missouri Pacific shares.*"

In other words, in 1962 Alleghany Corporation interpreted the provisions of the Articles of Association as giving them a veto power only over a merger or consolidation in which the Missouri Pacific is the surviving corporation and issues additional Missouri Pacific shares pursuant to the plan of merger, and not as giving a veto power over any merger or plan of consolidation such as the one now proposed in which Missouri Pacific is not the surviving corporation.

For a further discussion of the language of Missouri Pacific's Articles, reference is hereby made to the Brief of Respondent Missouri Pacific, pp. 38-47.

VI.

Chapter 388 (read in the light of the relevant constitutional provisions) in which the Missouri General Assembly has expressed the State's public policy with respect to the incorporation, organization and powers of railroad corporations, is the law of the State of Missouri applicable to the proposed plan of consolidation and requires the approval of the holders of only a majority of the capital stock of Missouri Pacific, without a class vote.

In this Section VI of the Argument, we will undertake to demonstrate that if there is any "applicable State law" of the State of Missouri relating to the proposed plan of consolidation, it is contained in Chapter 388, and the related constitutional provisions. In the next Section VII of the Argument, we will undertake to demonstrate that Chapter 351, which deals with general and business corporations, even as amended in 1961, is not the "applicable State law" of Missouri relating to the proposed plan of consolidation. And in the next following Section VIII of the Argument, we will undertake to demonstrate that even if Chapter 351 be construed as applying to the consolida-

tion of railroad corporations, nevertheless, Section 351.270 of that chapter refers only to charter provisions calling for a greater proportionate or percentage vote than that required by the several specific sections of Chapter 351, and not to charter provisions calling for class voting where none is required by the chapter. But before undertaking to examine, in considerable detail, the language of the pertinent sections of Chapter 388 (and the relevant constitutional provisions) and of Chapter 351, as we will do in the next two succeeding sections of the Argument, brief mention should be made of the history of the construction and consolidation of railroads in Missouri and the public policy of the State toward encouraging and aiding in the development not merely of a local intrastate system, but of transcontinental railroad lines.

(a) **History of and public policy toward railroads in Missouri.**

A brief history of the railroads in Missouri, found in *Missouri and Missourians,* by Shoemaker,[7] tells us:[8]

> "The prosperous days of the early 1830s brought an era of speculation in land, railroads, and canal systems to the whole country. * * * In 1837 the railroad agitation in Missouri showed itself in a frenzy of chartering railroads. Between January 23 and February 6, 1837, seventeen roads were chartered * * *. Between 1840 and 1850 came the great agitation for a transcontinental railroad. The treaty with China in 1844, followed closely by the acquisition of Oregon and California, the discovery of gold and the settlement of the Far West, increased the agitation for a railroad. Enthusiasm for railroads grew throughout

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[7] Secretary, The State Historical Society of Missouri.

[8] Vol. I, pp. 774-84 (1943).

the 1840s. The success of the Michigan Central and other lines helped to convince Missouri that railroads and canals were essential to her. * * * By 1849 competition was keen between the various routes for the proposed road to the Pacific. * * * The question of the route became one of the most discussed topics of the time, for it appeared that only one road could be built with government aid. The public opinion of the West was expressed through memorials from its legislatures, the press, and in conventions. * * * [At the second St. Louis Railroad Convention] On October 15, 1849, the delegates assembled in the rotunda of the St. Louis courthouse. Representatives came from forty-five Missouri counties and from the States of Pennsylvania, New York, Ohio, Indiana, Kentucky, Illinois, Iowa, Wisconsin, Michigan, Louisiana, and Tennessee. The largest delegation came from Illinois and was headed by Stephen A. Douglas, rapidly becoming the leading politician of the West. Later, representatives from Virginia, New Jersey and Maryland arrived * * *. On the second day of the convention the proceedings reported that 'Col. Thos. H. Benton was loudly called for, and took the stand. He addressed the convention at length upon the subject of a railroad to the Pacific.' * * * [and concluded] 'There is the East, there is India!' * * * Throughout the years following 1850 the laws of Missouri show the incorporation of many railroad companies. During the session of 1856-1857 alone, nineteen companies were incorporated * * *. By 1861 a total of 104 railroads had been incorporated since the beginning of the railroad agitation. * * * There was no general law regarding the incorporation of railroads until 1853, but in that year an act was approved outlining the various qualities of acceptable charters. * * * In 1866 the secretary of state was empowered to issue a certificate under the State seal,

as evidence of the corporate existence of a corporation after a copy of the articles of incorporation had been presented to him.

"*State Aid to Railroads in the 1850s.*

"* * * Thus by the end of 1852 five lines of railway, all save one radiating from St. Louis, had received grants totaling $8,250,000 from the State. * * * by the close of the year [1855] more grants of state bonds had been made, this time to the total of $11,000,000. * * * The people in the State were still anxious to have the roads completed as soon as possible, however, and in keeping with the spirit of speculation rife throughout the country the legislature on March 3, 1857, passed the fourth and last important act granting aid to the railroad companies. * * * The act of 1857 granted a total of $5,700,000 to six roads."

In addition to State aid, millions of dollars more were furnished by counties and municipalities of the State.

We do not know how many railroad companies were chartered by Special Acts of the General Assembly and, after 1866, were incorporated under general law, but some indication of the number is disclosed by an examination of the files in the office of the Secretary of State of Missouri. In accordance with the pattern set by the Missouri statutes, separate corporate files are maintained for domestic railroad companies, numbered consecutively. Although the files prior to 1911 were destroyed by a fire, those remaining run to 898, of which only twenty-three are still active. All of the rest of the domestic railroad corporations have disappeared—some by insolvency, forfeiture of charters, and liquidation, but a great many by absorption in one way or another into other railroad corporations. In some instances such absorptions were by purchase and sale of the assets and franchises, by purchases at foreclosure sales, and the like. In many in-

stances they were made by mergers and consolidations in the technical corporate sense.

In his *History of Missouri*, E. M. Violette, says:[9]

> "By 1880 railroad connections were made between Missouri and the great southwest and northwest portions of our country. * * *
>
> "While this expansion was going on among the railroads in and out of the state, a process of consolidation was also taking place. In fact, this consolidation was one of the things that made this remarkable expansion possible. By 1898 twelve companies owned 85 per cent of the railroads of Missouri, and practically all of these twelve companies were parts of interstate systems."

Interestingly enough, the first railroad to commence actual construction in Missouri was the Pacific Railroad, the original ancestor of the present Missouri Pacific, which was "chartered in 1849 with the intention that it would eventually reach the west coast,"[10] which intention was not only spelled out in its charter but reflected in its corporate name.

The Pacific Railroad was sold at foreclosure sale in 1876 and conveyed to the Missouri Pacific Railroad Company, a Missouri corporation. The original contemplated extension westwardly was partially accomplished by the consolidation in 1880 with two Kansas railroad corporations forming the Missouri Pacific Railway Company,[11] the consolidation in 1882 with a Nebraska railroad company,[12] and the consolidation in 1909, discussed in more detail below.

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[9] P. 248 (1960).

[10] *Shoemaker, op. cit. supra*, p. 761; *Laws of Missouri 1848-1849*, pp. 1919-1920; *Laws of Missouri 1853*, p. 353.

[11] Combined Fifth and Sixth Annual Reports of the Railroad Commissioners of Missouri, p. 19 (1879-1880).

[12] Eighth Annual Report of the Railroad Commissioners of Missouri, page 39 (1882).

It was also contemplated by the General Assemby that there should be a rail line running southwardly and tapping the Texas market. The Pacific Railroad was given authority to construct a line to the Arkansas border,[13] and the St. Louis and Iron Mountain Railroad Company, which eventually became the other great segment of what is now the Missouri Pacific system, was chartered on March 3, 1851, with the authority to run its line to the Arkansas border.[14] In 1855 the General Assembly confirmed the articles of incorporation of the Cairo and Fulton Railroad Company (of Missouri) and gave to that corporation land previously granted by Congress by Act approved February 9, 1853, to aid in the construction of a railroad from a point on the Mississippi River opposite the mouth of the Ohio, via Little Rock to the Texas boundary. Simultaneously, the State of Arkansas granted a charter to the Cairo and Fulton Railroad Company (of Arkansas) to construct a line from Missouri through Arkansas and *on into* the Texas market.[15] Thereafter in 1874 the three last-named corporations were consolidated to become the St. Louis, Iron Mountain and Southern Railway Company, a consolidated corporation of both Missouri and Arkansas.[16] While the large majority of the stock of this company was acquired by the Pacific Railroad Company in its 1880 reorganization,[17] this company remained a separate subsidiary corporation until the Missouri Pacific Reorganization of 1956, when it was merged into the Missouri Pacific.

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[13] *Laws of Missouri, 1853,* p. 363.

[14] *Laws of Missouri, 1850-51,* p. 479.

[15] *Laws of Arkansas, 1853,* p. 180.

[16] Combined Fifth and Sixth Annual Reports of the Railroad Commissioners of Missouri, pp. 25-26 (1879-80).

[17] See Pullman Car Co. v. Missouri Pacific Railway Company, 115 U. S. 587 (1885).

In 1871 Congress chartered the Texas Pacific Railroad Company,[18] and authorized that company to extend, in effect, the road from St. Louis and the mouth of the Ohio on into and through the heartland of Texas. In 1879 the Texas Pacific, the Missouri Pacific and the St. Louis, Iron Mountain and Southern came under the effective control of the Jay Gould interests.[19] The roads have had a close affinity of interest since that time, but only the corporate entities of the latter two roads were merged in the Section 77 Reorganization Proceedings consummated in 1956. The proposed plan of consolidation is but another step in the unaccomplished grand design laid out by the Missouri and Arkansas legislatures more than a century ago.

Thus, from the very beginning of the construction of railroads in Missouri, and continuing without interruption down to this date, it has been the policy of the State to encourage the construction, extension, combination and uniting of lines of railroad, both within and without the State, whether by technical corporate consolidation, or otherwise. Prior to 1865 this policy was expressed in the vast number of Special Acts of the General Assembly chartering railroad corporations, aiding in financing railroad corporations, specifically authorizing the extension of particular lines of railroad, and specifically authorizing the consolidation of particular railroad corporations. After the adoption of the Missouri Constitution of 1865, railroad corporations were organized pursuant to general law; and after 1870 the consolidation, extension, combination and uniting of railroad companies and lines was governed by 388.290 and 388.300 of Chapter 388, and after 1897 by Section 388.340 also.

A careful analysis of Section 388.290 and Section 388.300, which we will undertake below, with a somewhat briefer

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[18] 16 Stat. 573.

[19] *Riegel, The Missouri Pacific 1879-1900; 18 Mo. Historical Review* (Jan. 1924).

consideration of certain other sections of the chapter should, we believe, demonstrate the fact that such was the policy of the State. These sections gave the broadest possible powers to railroad companies, whether domestic or foreign, not only to construct and extend their lines within and without the State, but to unite and combine such lines, wherever located and by whatever legal techniques appear to be most desirable, subject only to the preservation of competition between competing lines and the authority of the State over those lines, or portions of lines, which are within the State. *In order to help carry out this policy, no Missouri Constitution and no Missouri statute dealing with railroads or railroad companies has ever required more than a majority vote for the approval of any such transaction, has ever given dissenting minority stockholders appraisal rights, nor has ever required, called for, or even permitted a class vote on any such transaction.*

The requirement for only a majority vote to approve the consolidation of railroad corporations and related transactions has been set forth five separate times in the Statutes of Missouri and never changed: First, in the Act of March 2, 1869, which, although it is no longer in the Revised Statutes, appears never to have been repealed; Second, three times in Sections which have been on the books since 1870 (Sections 388.290, Paragraphs 1 and 6 and 388.300, Paragraph 3); and, finally, in a Section which has been on the books since 1897 (Section 388.340).

An examination of these Sections will demonstrate that the proposed plan of consolidation comes within their terms and is authorized by them. But even if this Court should conclude that these statutes which do give broad authority to railroad corporations to consolidate their companies and combine, unite and amalgamate their lines do not, literally and narrowly construed, encompass the

specific plan of consolidation now proposed, nevertheless, we submit that the State of Missouri has clearly expressed, without deviation for nearly one hundred years, its public policy that a simple majority vote is all that should be required for any kind of consolidation of railroad companies or railroad lines, and that the public policy so expressed is the applicable State law of Missouri.

(b) General pattern of Missouri statutes dealing with railroads and those dealing with business corporations.

Considering the general pattern of the Missouri statutes we find that for one hundred years railroad corporations have occupied in the structure of Missouri law a category separate and distinct from other corporations, and, more specifically, separate and distinct from manufacturing and business corporations. As our Supreme Court has said in the case of *State ex rel. v. Cook,* 171 Mo. 348, 360-361, 71 S. W. 829, 832-833 (1902):

> "Railroad corporations are a class in themselves, having peculiar rights and corresponding liabilities, and they are often treated as a class by the lawmaking power * * *. But, as before observed, the property and business of a railroad company differ from those of all other corporations, and we must consider that peculiarity in this instance."

For example, the 1866 compilation of Missouri General Statutes contains, in Title XXIV the general heading "Of Private Corporations". Chapter 62 of that title had the caption "Of Their General Powers and Liabilities"; Chapter 63 the caption "Of Railroad Companies"; and Chapter 69 the caption "Of Manufacturing and Business Companies". Other chapters under the title dealt with telegraph companies, insurance companies, etc., and different titles dealt with other special kinds of corporations. This general pattern of separation of the statutes relating

to railroad corporations and the statutes relating to other types of corporations has continued down to date, with amendments being made separately from time to time of the chapter dealing with the general powers and liabilities of corporations, the chapter dealing with manufacturing and business companies, and, but very rarely, of the chapter dealing with railroad companies. Following this general pattern the Missouri General Assembly has enacted entirely separate and distinct statutes dealing with the consolidation, in both a technical corporate sense and in a broad general sense, of railroad corporations and other separate and distinct statutes dealing with the consolidation (but in this instance in the technical corporate sense only) of manufacturing and business companies.

The first statute dealing with the consolidation of railroad companies was enacted in 1869 and it bore the title "An Act to authorize the consolidation of Railroad Companies in this State with companies owning connecting railroads in adjoining States,"[20] and authorized such consolidations on the basis of a majority vote. We do not find that this statute has ever been repealed although it has been omitted from subsequent revisions. The next year, 1870, the General Assembly enacted another statute[21] authorizing in vastly more general terms, but still on the basis of a majority vote only, the consolidation of railroad companies which, with insignificant and immaterial changes, now appears as Sections 388.290 and 388.300 of Chapter 388, discussed in detail below.

In the same year, and one day later, the General Assembly of Missouri enacted the first general law authorizing the consolidation of non-railroad corporations, but on the basis of a three-fifths vote, and the authority was expressly limited to corporations organized or created

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[20] *Laws of Missouri 1869*, p. 75.

[21] *Laws of Missouri 1870*, p. 89.

"solely for manufacturing purposes."[22] While the railroad consolidation statute has been left unchanged in any substantial or material respect, the consolidation statute for manufacturing corporations has undergone a number of substantial changes. In 1921 the authority to consolidate was expanded to include "corporations organized for some or all of the purposes permitted to manufacturing and business corporations by subdivisions first, second, fourth, fifth and eleventh of Section 10151,"[23] but did not touch railroad corporations.

In 1927 the statute dealing with consolidation of manufacturing corporations was again slightly modified,[24] but that dealing with the consolidation of railroads was not touched. In 1943, as will be discussed more fully below, Missouri enacted the Business Corporation Law, which made extensive revisions in the laws (including the consolidation and merger sections) dealing with general business corporations, but the Act was limited to such corporations and more particularly the merger and consolidation provisions did not touch railroad corporations.

(c) **The specific provisions of Chapter 388.**

Chapter 388 constitutes a detailed and rather extensive railroad corporation code. Chapter 389 deals even more extensively with the regulation of railroad corporations.

In considering the applicability of Chapter 388 to the proposed plan, a number of sections must be examined, some in considerable detail.

Section 388.010 provides:

> "Railroad corporation defined.—The term 'railroad corporation' as used in this chapter shall be deemed

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[22] *Laws of Missouri, 1870,* p. 25.

[23] *Laws of Missouri, 1921,* p. 267.

[24] *Laws of Missouri, 1927,* pp. 396-97.

and taken to mean all corporations, companies or individuals *now owning or operating, or which may hereafter own or operate, any railroad in this state.*"

No distinction is drawn between domestic and foreign corporations. It is not even necessary that a foreign corporation own a railroad in the state in order to come within the definition—it is sufficient if it merely operates a railroad in the state.

Section 388.280 provides:

"**Companies may contract with each other.**

"All railroad corporations may contract with each other, or with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management."

The term "railroad corporations", as used in this section, when read in the light of Section 388.010, and the constitutional provisions discussed below, must refer to both domestic and foreign railroad corporations, and is obviously intended to give extremely broad powers to railroad companies wherever organized in dealing with each other. Under this section the contract may be a lease or an operating contract. *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 36 S. W. 602, 135 Mo. 173; *Chicago, B. & Q. R. Co. v. McCooey*, 200 S. W. 59, 273 Mo. 29. Thus, pursuant to this section, a foreign railroad corporation, such as Texas & Pacific, could contract to operate a railroad in Missouri, and, as will be pointed out below, would then immediately become eligible to consolidate in the technical corporate sense with a domestic railroad corporation pursuant to even a strict and literal interpretation of Section 388.290.

Section 388.290, which, as stated above, was enacted in 1870 and with insignificant modifications has been in effect ever since, provides, in paragraph numbered 1, as follows:

"1. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole *or in the main,* and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company *or road proposing to consolidate,* at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock."

As discussed below, it has been suggested that the words "in this state" in the first line of the above paragraph limits the authority to consolidate to domestic railroad corporations. Instead, having in mind Section 388.010, supra, which defines the term "railroad corporation" as meaning "all corporations, companies or individuals now owning or operating * * * any railroad in this state", it would seem to be clear that the paragraph is intended to apply to all railroad corporations, domestic or foreign, so long as they own or operate railroads in this state. Although the word "consolidate" as used in this paragraph 1 appears, in the first instance, to be used in the technical corporate sense, nevertheless, the words "in the main" seem to imply a transaction in which only a portion of a railroad is combined with another, and there is a refer-

ence toward the end of the paragraph to the "company or road proposing to consolidate", and, of course, a "road" can neither propose to consolidate nor be consolidated in the technical corporate sense. Also, while the authority to consolidate is limited to companies owning railroads which will form "in the whole or in the main one continuous line of railroad",[25] there is no requirement that the connection be within this state nor does it refer to a connection at the state line as in Section 388.300 1. discussed below.

It should be noted that the contract fixing the terms and conditions of the consolidation need only be approved by a majority in interest of all of the stock, and that such approval may be given either at a meeting of the stockholders or by the "approval, in writing" of the holders of a majority of such stock, which would require no meeting.

Paragraph numbered 2 of said Section 388.290 uses the term "consolidation" in the technical corporate sense, and in paragraph numbered 3 the section initially speaks of a technical corporate consolidation, but then provides, in part, as follows:

> "3. * * *; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies *or roads,* except when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads."

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[25] Petitioner Levin concedes (Levin Br. p. 9), that a merger between Missouri Pacific and Texas & Pacific would produce an "end-to-end" connection between the two lines.

Again we note that the term "consolidation" is used with respect to railroad companies "or roads", and it prohibits "roads" from consolidating, suggesting that the terms "consolidation" and "consolidate" are used in the broad, general, and not technical corporate, sense.

Here the public policy of the State of Missouri, limiting and restricting, in two respects, the power of railroads to consolidate, is clearly expressed. There may be no consolidation of any kind, pursuant to Section 388.290, "except when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction", but with no requirement that the continuous line of roads be within this state; and that it shall not be lawful for the roads to consolidate "when by so doing it will deprive the public of the benefit of competition between said roads."

Section 388.290 further provides:

> "4. And in case any such railroad companies shall consolidate or attempt to consolidate *their roads* contrary to the provisions of this section, such consolidation shall be void, and any person or party aggrieved, whether stockholder or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise."

Once more we find the term "consolidate" used in the broad, general sense when it is used referring to "their roads" rather than to their corporations or companies. This paragraph should be borne in mind in connection with the discussion below of Chapter 351, and, more specifically, of the question whether Section 351.458 of that chapter purports to authorize the consolidation of railroad companies without limitation and contrary to the provisions of Section 388.290.

Finally, Section 388.290 provides:

> "6. Before any railroad companies shall consolidate their *roads,* under the provisions of this section, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

Once more we find the term "consolidate" used in connection with the words "their roads".

It should also be noted that the resolution accepting the provisions of Section 388.290 is different from and in addition to the resolution or the written approval of a contract of consolidation, so that there must be two acts by the stockholders—first, a ratification and approval of the agreement of consolidation, by resolution at a meeting or in writing without a meeting, in either case by a majority vote, and, second, a resolution accepting the provisions of the section which must be passed, also by a majority vote, at a meeting of stockholders of which sixty days' public notice must be given. In connection with such public notice, it should be noted that the statute specifically provides that such public notice must be given by advertisement in a newspaper printed in the county where the "general offices" of the company or companies of this state are situated. Later on, in considering the question as to the application of Chapter 351, it will be found that there is a direct conflict between this section and the corresponding section of Chapter 351.

Section 388.300 authorizes, in paragraph numbered 1, four separate types of transactions by and between railroad companies each of which should be examined separately. First it provides:

> "Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, *or otherwise,* aid such company in the construction of its railroad *within or without the state,* for the purposes of forming a connection of the last mentioned road with the road owned by the company furnishing such aid, . . ."

Here we have authority, in the broadest possible terms, for one railroad company to aid another railroad company. It is not specifically required that either the railroad company furnishing the aid or the one receiving it must be a domestic corporation, although it is undoubtedly contemplated that one or the other would be. The aid may take the form of a stock subscription "or otherwise", without any limitation whatsoever as to the technical form of the aid included within the word "otherwise". It specifically provides that the railroad to be constructed may be "within or without the state", and the connection between the roads is not required to be either within the state or at the state line.

This paragraph numbered 1 of Section 388.300, next provides:

> "or any such railroad company which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may *build, buy, lease or consolidate, in the manner provided in section 388.290,* with any railroads in such adjoining state, and operate the same, and may own such real estate and other property in such ad-

joining state as may be convenient in operating such road;"

Once again we find the word "consolidate" used in the broad non-technical sense. The section speaks of the consolidation with any "railroads" instead of with "railroad companies". Furthermore, the term is used in connection with the words "built, buy, lease", indicating that the Missouri General Assembly was drawing no technical legal distinction between the methods of combining or uniting railroads for the purpose of combined operation. Instead, it was giving broad authority to both domestic and foreign railroad companies to put their lines of railroad together by any appropriate, legal technique for the purpose of producing a consolidated operation. Furthermore, the express authority here given to railroad companies to consolidate their lines "in the manner" provided in Section 388.290 rather than "pursuant to the authority" contained in that section should, we suggest, be construed as referring merely to the legal procedure or method which might be followed in consolidating the companies rather than as restricting or limiting the extent or the authority to consolidate the railroads or companies to that given in Section 388.290. This construction is confirmed by the punctuation. The phrase "in the manner provided in Section 388.290" is separated by a comma from the word "consolidate", so that the phrase refers back to and modifies the preceding five words, "build, buy, lease or consolidate".

Finally, just as in the constitutional provision quoted below, we will see that it is contemplated that a consolidation of domestic and foreign railroad corporations may take place by means of a "sale", so here in the statute we find the use of the corresponding term "buy", and below we will find the use of the word "purchase".

This paragraph numbered 1 of Section 388.300 next provides:

"or any railroad company *organized in pursuance of the laws of this or any other state, or of the United States,* may lease or *purchase* all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point *either within or without this state,* upon such terms as may be agreed upon between said companies respectively;"

Here we find that the authority granted under this portion of the paragraph specifically includes foreign as well as domestic railroad companies; that the connection between the lines of roads may be at a point "either within or without this state"; and that the authority given is to "lease or purchase" all or any part of a railroad any part of which is in this state, together with "its privileges, rights, franchises." We suggest that the General Assembly was not using the word "purchase" in the narrow sense but in its more extended legal meaning as including every method of acquiring title to real or personal property other than by descent. This very word "purchase" was used in an Illinois statute dealing with the consolidation of railroad corporations and was expressly construed by the Supreme Court of Illinois in the case of *Chicago & E. I. R. Co. v. Doyle, et al.,* 256 Ill. 514, 100 N. E. 278, 280. There the statute authorized any railroad company organized under the laws of the state to "purchase" the lines of another railroad subject to certain restrictions. The Chicago & E. I. Railroad Company, an Illinois corporation, undertook to acquire the lines of two Indiana railroad corporations by *merging* them into the Illinois company. The Court held that the transaction did not have to take the form of a technical purchase and sale in order to come within the

statute, but that it was sufficient if the properties, franchises and corporate rights of the merging corporations were acquired by the surviving corporation, saying, l. c. 280:

> "It will be observed that the language of the statute authorizes and empowers railroad companies 'to purchase and hold in fee simple or otherwise, and to use and enjoy the railway property, corporate rights and franchises,' etc. Manifestly, the word 'purchase' in this statute is not used in its popular and commercial meaning as equivalent to the word 'buy', but in its more extended legal meaning, as including every mode of acquiring title to real estate other than by descent. 'Purchase', in its enlarged and legal signification, means the acquisition of real property by any voluntary act of the parties as distinguished from title by descent, which results from the operation of the law. 7 Words and Phrases. *When the Legislature authorized railroad companies, under certain conditions and limitations, 'to purchase and hold' the property rights and franchises of other railroad companies, the power was thereby granted to acquire such properties by any form of lawful agreement,* and it is not necessary that the transaction should take the form of a technical sale, in which it is necessary that there should be a vendor and a vendee and a quid pro quo. *It is sufficient that the contract or agreement has the effect of merging the properties, franchises, and corporate rights of the merging company into the merger corporation, and that as a net result of the transaction one corporation has disposed of its property and franchises and the merger company has acquired them in a lawful manner.*"

Similarly, this Court has held in the case of *U. S. v. Philadelphia National Bank*, 374 U. S. 321, that Section 7 of the Clayton Act, as amended in 1950, which provides

that no corporation shall "acquire," directly or indirectly, the whole or any part of the stock or other share capital of another corporation, applies to the acquisition of another corporation, whether it be by means of a *technical consolidation or merger.*

The final provision in paragraph numbered 1 of Section 388.300 reads as follows:

> "or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state."

When this portion of Section 388.300 was originally enacted in 1870, it referred only to railroad companies incorporated under the laws of "an adjoining" state. But by an Act of March 16, 1881,[26] this section was amended by striking out the words "an adjoining" and inserting the word "any", thereby emphasizing the intention of the General Assembly to give to any foreign railroad company the broadest possible power to come into and through this state.

In paragraph numbered 2 of Section 388.300, the authority granted in paragraph numbered 1 is restricted as follows:

> "Provided, that no such aid shall be furnished, nor any purchase, lease, subletting or *arrangements* perfected until a meeting of the stockholders of said company

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[26] *Laws of Missouri 1881*, p. 75.

or companies of this state, party or parties to such *agreement,* whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated or affected by such *arrangements,* shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' public notice thereof having been previously given and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state."

This paragraph, by lumping together with consolidations any kind of furnishing of aid, and any "purchase, lease, subletting or arrangements" or "agreement" whereby a railroad company may be "consolidated or affected" and by calling for the sixty days' public notice required for the consolidation of domestic and foreign railroad corporations (by the Constitutions of 1875 and 1945 mentioned below), suggests that the General Assembly is drawing no distinction between any of such transactions. It would appear that they are all encompassed within the terms "consolidate" and "consolidation" as used in the statute and in constitutional provision requiring such notice if any domestic railroad corporation shall "consolidate, by sale or otherwise" with any foreign railroad corporation.

Once more we find the statute providing that the assent of only a majority of the stock is required, and that such assent may be given at a meeting or in writing without a meeting.

Finally, Section 388.300 provides, in part, in paragraph numbered 3, as follows:

"And provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or *make arrangement for operating the same as provided in sections 388.290* and *388.300*, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state;"

Note that if a foreign railroad corporation shall make an "arrangement for operating" a railroad the whole or a part of which is in this state, it is deemed to be synonymous with the words "consolidate" and "consolidation" as that term is used in Section 388.290 and with any of the varied transactions described above in Section 388.300.

Section 388.340 reads as follows:

"**388.340. Extension of lines—other roads, how acquired—assent of majority of stockholders required.**

"Any railroad company heretofore organized, or which may hereafter be organized under the laws of this state, may extend its line of railroad beyond this state into or through *any other state or territory*, and may *acquire* any line of railroad *within or without this state* which shall form a continuous line with the road operated by such company, by direct connection or by bridge, ferry or otherwise, or over any other line or lines constructed, or to be constructed, and which bridge, ferry, line or lines, such company shall have the right, by contract or otherwise, when completed, to use or operate, and may *acquire and may hold the obligations and stock* of other companies owning or operating any such lines of road, bridge or ferry; provided, that no line of railroad shall be so purchased until a meeting of the stockholders of

such company or companies of this State, party or parties to such an agreement, whereby a railroad in this state may be purchased, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' due notice thereof having been previously given, and the holders of a majority of such stock, by person or proxy, shall have assented thereto, or until a majority of the holders of the stock of such company shall have consented thereto, in writing, and a certificate thereof signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state."

Here we find specific authority for any domestic railroad corporation to extend its line of railroad beyond the state and into or through any other state or territory, and authority for such corporation to "acquire" any line of railroad within or without the state. If, as pointed out above, the prohibition in Section 7 of the Clayton Act against *acquiring* the whole or any part of the stock or other share capital of another corporation prohibits such acquisition by means of a consolidation or merger, the specific authority given to a domestic railroad corporation to *acquire* the stock of other railroad companies should include authority to make such acquisition by means of a consolidation or merger.

Whether the word "acquire" is used as synonymous with "purchase" or is used in an even broader sense, once more we find that the kind of transaction authorized by the section is deemed to come within the constitutional provision mentioned below requiring sixty days' notice. Again the assent of only a majority vote is required, and that assent may be given at a meeting or in writing without a meeting.

Does not the language of these sections suggest that the General Assembly was giving the broadest possible

authority to the Pacific Railroad to reach the Pacific, to that and other railroads to reach the Texas market, and to all Missouri railroad companies to expand by any lawful means over the length and breadth of the land?

As pointed out above said Sections 388.290 and 388.300 were enacted in 1870 and, with insignificant changes, except for the one changing the words "adjoining state" to "any state", have remained in effect ever since. At the time they were enacted there was no provision in the Missouri Constitution of 1865 (the one in effect in 1870) dealing in any way with the subject of the consolidation, in either a technical corporate or in a general sense, of railroads or railroad companies.

But in 1875, and with these sections on the books, a new Constitution was adopted, which remained in effect until 1945. It contained in Article XII, in addition to eleven sections dealing with corporations generally, thirteen sections dealing specifically with railroad companies, two of which, Sections 17 and 18, are of significance here and read as follows:

> "**Sec. 17. Shall not consolidate with parallel lines nor have joint officers.**—No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall *consolidate the stock, property or franchises of such corporation* with, or lease or *purchase the works or franchises of*, or in any way control, *any railroad corporation* owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues."
>
> "**Sec. 18. Consolidation with foreign companies.**—If any railroad company organized under the laws of

this State shall consolidate, by sale or otherwise, with any railroad company organized under the laws of any other State, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this State shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place. In no case shall any consolidation take place, except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

The term "consolidate" is not only used, in Section 17, supra, in the sense of combining or uniting the stock, property or franchises of railroad corporations, but as synonymous with a "purchase" of, or in any way controlling, a railroad corporation. In Section 18, supra, it is used as synonymous with a "sale" corresponding to the General Assembly's use of the word "purchase" in Section 388:300 and the word "acquire" in Section 388.340, discussed above. And when, in Section 18, supra, the words "or otherwise" were added, it would appear that there is no type of a legal transaction resulting in the combining of railroad operations which could not be construed as coming within the meaning of the terms "consolidate" and "consolidation".

Thus the Constitution of 1875 recognized and, we submit, interpreted, the existing statutes, now Sections 388.290 and 388.300, as using the term "consolidate" and "consolidation" not in a narrow, technical sense, but in a very broad, general and non-technical sense—as referring to any type of transaction whereby railroad properties might be combined or united, whether by purchase and sale of the physical property and/or franchises, by the acquisition of the capital stock of one railroad corporation by another, by a lease, an operating agreement, a contract or arrangement, a technical corporate consolidation, or otherwise.

It should also be noted that these constitutional provisions contemplate the consolidation of domestic and foreign corporations, that they impose no requirement that there be any connection between the roads of the consolidated corporations, or as to the place where such connection, if any, shall occur, or that the consolidated road shall form a continuous line or be an end-to-end consolidation. The only limitations are that parallel or competing lines may not be consolidated and that no consolidation can take place except upon at least sixty days' public notice to stockholders in the manner provided by law.

In 1945, Missouri adopted a new Constitution, still in effect, in which the article on corporations in the Constitution of 1875 was revised. In explanation of these particular revisions the Constitutional Convention said:

> "The new article on corporations reflects the present day business and economic conditions rather than those prevailing in 1875. The article has been substantially reduced in length by the omission of antiquated provisions, especially those regarding railways which are now regulated by the Interstate Commerce Commission."[27]

One of the "antiquated" provisions of the 1875 Constitution which was dropped out because no longer needed was Section 17 of Article XII; but Section 18, supra, was retained almost verbatim and is now Section 10 of Article XI of the 1945 Constitution, and continues to recognize that domestic railroad corporations may consolidate "by sale or otherwise" with foreign railroad corporations.

Thus it would seem to be clear that, from 1875 to date, the Constitutions of the State of Missouri have construed

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[27] Missouri Revised Statutes III (The large volume containing Annotations, History and Forms), p. 36.

the Missouri statutes as authorizing the combination, uniting or consolidation of railroads and railroad companies, both domestic and foreign, by means of almost any type of legal transaction.

In summary, we find that Chapter 388 specifically authorizes (a) any two or more railroad companies owning or operating railroads, the whole or a part of which is in this State, to consolidate, in the technical corporate sense, if their lines will constitute in the main one continuous line of railroad; (b) any railroad company to aid any other railroad company in the construction of its railroad within or without the State by subscription to stock "or otherwise"; (c) any railroad company which has built its road to the boundary line of the State to build, buy, lease or consolidate with any railroads in the adjoining State; (d) any domestic or foreign railroad company to "purchase" all or any other part of a railroad, the whole or any part of which is in this State, if there will be an end to end connection at a point within or without the State; (e) any domestic or foreign railroad company to extend, construct, maintain and operate its railroad into and through this State; and (f) any domestic railroad company to "acquire" any line of railroad within or without the State which when connected within or without the State will form a continuous line; and that, in general, the constitution and the statutes make no distinction between a technical corporate consolidation and any other type of legal transaction whereby one railroad company may combine or unite its railroad properties with those of another railroad company for purpose of ownership and/or operation of such railroads as a continuous line. Nor, bearing in mind the policy of the State to encourage the construction, extension and combination of lines of railroad, is there any logical reason why the broad authority given to railroad companies to construct, extend, combine and unite their lines, subject only to the requirements

(i) that a continuous line be formed, and (ii) that competition between competing lines not be eliminated, should be limited by the requirement that any specific legal technique be used to accomplish the desired result.

But even if Chapter 388 should be literally and narrowly construed and so as to exclude the proposed plan of consolidation, nevertheless it does clearly and unequivocally set forth the public policy of the State of Missouri that the consolidation of railroad companies and railroad lines should be encouraged and facilitated and that nothing more than a simple majority vote of the stockholders, with no class vote, should be required to approve any transaction, no matter what legal form it may take, which tends to accomplish that objective.

(d) **Actual consolidations between domestic and foreign railroad corporations.**

The Court of Appeals (R. 151-153) found the phrase "in this state" in the first sentence of Paragraph 1 of Section 388.290, troublesome, and because of the fact that Texas and Pacific is not a Missouri corporation and has no railroad property in Missouri, seems to have agreed with petitioners' (appellees below) contention that a domestic and a foreign railroad corporation could not effect a consolidation, such as the one proposed here, pursuant to the provisions of any section of Chapter 388. The Court of Appeals brushed aside (R. 152) Missouri Pacific's contention "that 'the last great consolidation involving a Missouri railroad', namely, that of the Missouri-Kansas-Texas was effected through a plan precisely the same in structure as the one here proposed, in that it must have been accomplished under Chapter 388 because the two-third vote otherwise required by Chapter 351 hereinafter mentioned, was not present," on the ground that it did not appear that the plan was "effected in the face of opposing argument." But the fact is that

the Missouri-Kansas-Texas consolidation was consummated in 1960, 312 I. C. C. 15 (1960), and, as will be demonstrated below, could not possibly have been consummated pursuant to any authority contained in Chapter 351. It must, therefore, have been consummated, without opposition, pursuant to the authority contained in Chapter 388 or if that was not the applicable State law, there was no applicable State law and it was consummated pursuant to the authority contained in Section 5 (11).

But this was not the only technical corporate consolidation of railroad companies organized under the laws of the State of Missouri with railroad companies organized under the laws of other States. While we have not attempted to make a precise compilation, certainly there were dozens and perhaps a hundred or more of such consolidations. We have only examined the Annual Reports of the Railroad Commissioners for the State of Missouri[28] for three of the thirty-seven years of the Board's existence, which years we assume are typical. One of these, the Eighth Annual Report for the year ended December 31, 1882, shows, Appendix A, pages 39-41, four separate technical corporate consolidations of Missouri railroad companies with railroad companies organized under the laws of other States. The combined Fifth and Sixth Annual Reports for the years 1879 and 1880 shows, page 6, for the year 1879 one technical corporate consolidation between a domestic and foreign railroad corporation, and, page 7, for the year 1880 two technical corporate consolidations between domestic and foreign railroad corporations. It also sets forth, pages 10-36, a list of the companies operating railroads in Missouri at the close of

[28] The Board of Railroad Commissioners was originally formed in 1875. *Laws of Missouri, 1875*, p. 113. And in 1889, *Laws of Missouri, 1889*, p. 124, its jurisdiction was expanded to include grain inspection and the title was changed to Board of Railroad and Warehouse Commissioners. It continued as such until 1913, when it was succeeded by the Public Service Commission.

the year 1880, with a brief statement of their corporate histories, indicating, inter alia, the technical corporate consolidations which had occurred, in addition to other types of combinations and acquisitions. A substantial number of technical corporate consolidations are listed, of which at least a dozen were between domestic and foreign corporations.

As an example of a great railroad consolidation involving a Missouri railroad which could not have been consummated pursuant to the predecessors of Chapter 351, could not have been consummated pursuant to Section 5 (11) because the Transportation Act of 1940 had not been enacted, and had to be and was expressed to be consummated solely under the authority of Chapter 388, we call the Court's attention to the Missouri Pacific Railway Company consolidation of 1909. It is of particular interest because in the proceedings the requirements of Chapter 388 were not only met but specific reference to that chapter (then Article 2 of Chapter 12, Revised Statutes of Missouri 1899) was made. That consolidation involved eleven other companies, nine of which were corporations of the State of Kansas and two of which were corporations of the State of Missouri. This was not solely a consolidation of railroad corporations owning or operating railroads wholly or partly in Missouri, or of railroads meeting at the state line, since at least five of the Kansas corporations owned lines wholly in Kansas and not reaching the Missouri line, to-wit: The Central Branch Railway Company, The Rooks County Railroad Company, The Kansas Southwestern Railway Company, The Kanopolis and Kansas Central Railway Company, and The Leroy and Caney Valley Air Line Railroad Company.[29]

A fire which occurred February 5, 1911 destroyed substantially all of the records in the office of the Secretary

[29] *Poor's Manual of Railroads*, 1908, pp. 574, 580, 581, 619.

of State of Missouri and all records relating to this consolidation, but copies of the Contract and Articles of Consolidation and certain supporting documents were also filed in other states including the office of the Secretary of State of the State of Nebraska, indexed in Book E, p. 182 of the corporate records of the Secretary of State of Nebraska. Among the supporting documents were minutes of the meeting of the stockholders of each of the consolidating companies held August 6, 1909. An examination of such minutes of each of such companies, not only those organized under the laws of the State of Missouri but the nine organized under the laws of Kansas, will disclose that in addition to giving their assent to the consolidation, each adopted the same preamble and resolution reading, except for the change of name of the company adopting the same, as follows:

"Whereas this meeting has been duly called for the purpose, among others, of considering, and voting upon the adoption of, a resolution accepting the provisions of Article II of Chapter 12 of the Revised Statutes of the State of Missouri, 1899, and to authorize the filing thereof, all as required by section numbered 1059 of such Revised Statutes in the case of consolidation of railway corporations, and to take any other action in the premises, and to transact any other business that may properly come before the meeting;

"Resolved that, pursuant to the provisions of section numbered 1059 of the Revised Statutes of the State of Missouri, 1899, The Central Branch Railway Company and the stockholders of said Company hereby accept the provisions of Article II of Chapter 12 of the Revised Statutes of the State of Missouri, 1899; and that the president or a vice-president of said Company be and hereby is authorized and directed to sign this resolution and that the secretary or an as-

sistant secretary of said Company be and hereby is authorized and directed to attest this resolution, under the seal of said Company, and that the proper officers of said Company be and hereby are authorized and directed to cause this resolution, so signed, attested and sealed, to be filed with the Secretary of State of the State of Missouri, and to do all other acts necessary or proper in the premises."

The said Section 1059 referred to is now Section 388.290, and it cannot be denied that the consolidation was consummated pursuant to the authority granted by that section.

(e) **The reported cases.**

We find a number of cases in the books, both State and Federal, expressly recognizing the right of railroad corporations organized under the laws of the State of Missouri to consolidate in a technical corporate sense with railroads organized under the laws of other states pursuant to the provisions of Chapter 388 and its predecessors even though no one thought it worthwhile to challenge the authority to consolidate and to litigate the question.[30]

The consolidations referred to in those cases were not only made pursuant to the provisions of the Act of March 24, 1870, now Sections 388.290 and 388.300, and, in one case, the Act of March 2, 1869, but, as will be pointed out below, could not have been made pursuant to the provisions of the predecessors of Chapter 351, because the right to consolidate under such laws was expressly limited, originally to manufacturing and later to manufacturing and business corporations.

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[30] Leavenworth v. Chi. & c. Railway Co., 134 U. S. 688 (1890); Livingston County v. Portsmouth Bank, 128 U. S. 102 (1888); Winn v. Wabash R. Co., 118 Fed. 55 (1902); State v. Roach, 267 Mo. 300, 184 S. W. 969 (1916); Evans v. The Interstate Rapid Transit Ry. Co., 106 Mo. 594 (1891).

The only references in the reported cases to Chapter 351, or any section thereof, as applying to the merger or consolidation of railroad corporations, are found in the cases of *In re Missouri Pacific Railroad Company*, 129 F. Supp. 392, 402, and *Missouri Pacific R. Co. Reorganization*, 290 ICC 674, 684. In neither of these situations was the District Court or the Interstate Commerce Commission directly concerned with the question as to whether or not the authority for the mergers was to be found in Chapter 388 or Chapter 351. A question was being raised as to the power of the Commission and the District Court to approve, for submission to stockholders, a plan of reorganization under Section 77 of the Bankruptcy Act,[31] which plan of reorganization provided for the merger of two of the debtor corporations into the Missouri Pacific. Naturally, the assent of the stockholders had not yet been given pursuant to Section 5 (11) of the Interstate Commerce Act at the times the plan was before the Commission and later the Court for their approvals. The District Court merely held that the directors of the debtor corporations, in filing the debtor's petitions under Section 77 of the Bankruptcy Act, were the source of the merger proposals which the stockholders would eventually be called upon to approve, citing Sections 351.410 and 351.415, which sections, in setting forth the procedure to be followed by merging and consolidating corporations, provide that the directors shall approve the plan before it is submitted to vote at a meeting of the stockholders. In doing so the Court overlooked the fact that, as pointed out below, these sections expressly provided that they applied only to corporations "formed for a purpose for which a corporation may be formed under this chapter" (351) and that railroad corporations could not be formed under that chapter.

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[31] 11 U. S. C. 205.

Likewise, the Commission was dealing with a contention of certain of the parties summarized by the Commission as follows, l. c. 684:

> "Petitioners contend that these statutory requirements [which require mergers to be proposed by the directors and approved by a two-thirds vote of the stockholders of the merging corporation] were not complied with in the case of either debtor, and that consequently the plan was not initiated by the carriers to be merged."

The parties making this contention relied upon the decision in the case of *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298 (1954). The Commission held that the action of the debtor corporations, through their respective boards of directors, in initiating the reorganization proceedings under Section 77 of the Bankruptcy Act was a sufficient initiation of the mergers proposed in the final plan of reorganization to permit the Commission to approve such plan. The question as to the ultimate authority of railroads to merge or consolidate was not before the Commission, and the reference to the laws of Louisiana and Missouri requiring mergers to be proposed by the directors was only incidental to the Commission's decision as to the effect of the filing of the debtors' petitions.

We respectfully submit that, bearing in mind the history of the policy of the State of Missouri to encourage the construction, extension and combination of lines of railroad, both within and without the State, whether by technical corporate consolidation, or otherwise, subject only to the condition that the public be not deprived of the benefits of competition, the general pattern of the Missouri statutes dealing with railroad and with business corporations, the language of the specific sections discussed above, the actual operation of the chapter over the years and the reported cases, Chapter 388 should be construed as

applying to the proposed plan of consolidation and as being the applicable law of the State of Missouri within the meaning of Section 5 (11) of the Interstate Commerce Act.

VII.

The Business Corporation Law is not the law of the State of Missouri applicable to the proposed plan of consolidation.

In contrast with the State's policy respecting railroad corporations, the State of Missouri has imposed much stricter requirements on manufacturing and business corporations in the matter of mergers and consolidations, and the sale, lease, exchange, or other disposition of all or substantially all of their assets.

From the date of the first general law authorizing the incorporation of manufacturing and business corporations, they have either been denied the power to consolidate, or have been required to obtain more than a majority vote. Never have manufacturing and business corporations been permitted to consolidate by a majority vote as permitted to railroad corporations since 1869, and this discrimination, if that is the proper term, against the consolidation of manufacturing and business corporations and in favor of the consolidation of railroad corporations emphasizes the public policy of the State to encourage the construction, extension, combination and uniting of railroads.

Manufacturing companies were first authorized to consolidate in 1870 with a 3/5th vote of their stockholders.[32] It was not until 1921 that this privilege was expanded to include business corporations which might be incorporated for certain, but not all, of the purposes permitted

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[32] *Laws of Missouri, 1870*, p. 24; *Doe Run Lead Co. v. Maynard*, 283 Mo. 646, 683, 223 S. W. 600 (1920).

to manufacturing corporations.[33] And in 1943 the three-fifths requirement was increased to two-thirds, and the sections rewritten.[34]

Turning to the specific provisions of Chapter 351 and its predecessors, we state, categorically, that prior to July 18, 1961, neither Chapter 351 nor any of its predecessors dealing with corporations generally and/or with manufacturing and business corporations, could possibly have been the law of the State of Missouri applicable to a plan of consolidation of railroad corporations, domestic or foreign. Furthermore, as we shall undertake to demonstrate below, on and after July 18, 1961, the date on which the amendment to Chapter 351 upon which petitioners rely was adopted, Chapter 351 has not been and is not now the law of the State of Missouri applicable to the proposed plan of consolidation, or any plan of consolidation of railroad corporations, domestic or foreign.

As pointed out above, for many years prior to 1943, Missouri's general corporation laws were divided into one chapter or article dealing with the organization, powers, duties, limitations and matters of practice of corporations generally and separate chapters, articles or codes dealing with specific types of corporations such as banks, trust companies, insurance companies, telephone and telegraph companies, etc. One such separate chapter or article dealt with railroad corporations and another and completely different chapter or article with manufacturing and business corporations.

In 1943 the Missouri General Assembly passed *The General and Business Corporation Law of Missouri.* This Act repealed substantially all of the provisions of Article 1 of Chapter 33 of the Revised Statutes of 1939, dealing with the organization, powers, duties, liabilities and mat-

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[33] *Laws of Missouri, 1921,* p. 268.

[34] *Laws of Missouri, 1943,* p. 410.

ters of practice of corporations generally, and all of Article 6 dealing with manufacturing and business corporations, and adopted a new corporation code. This code is now Chapter 351 of the Missouri Revised Statutes, 1959, which bears the caption "General and Business Corporations" and includes Sections 351.010 to 351.720, both inclusive.

(a) The general scope of the 1943 revision.

The primary purpose of the 1943 Act was to revise the general-power provisions and the provisions governing "manufacturing and business companies." The title of the Act makes this clear: "Relating generally to the organization, powers, duties, liabilities and matters of practice of corporations and to manufacturing and business companies."[35] The chairman of the committee which drafted the Act says the same thing: "it was deemed expedient to *limit the revision at the time to corporations which would ordinarily come under Article 6 of the old law*", i. e., manufacturing and business corporations.[36] The railroad code was not touched.

(b) Section 351.690.

The old Article 1 of Chapter 33, which dealt with the powers and procedures generally of all corporations, did, in some limited respects, apply to special types of corporations (other than manufacturing and business companies) organized under other corporate codes. As pointed out above, the revisers deemed it expedient at the time to limit the revision to manufacturing and business corporations, but, in order to do so, had the General Assembly revise both Articles 1 and 6 of Chapter 33 and amalga-

[35] *Laws of Missouri, 1943,* p. 410.

[36] *Cowherd, Missouri Modernizes Her Business Corporation Code,* 12 U. Kan. City L. Rev. 89, 94 (1944).

mate them into one Business Corporation Law, which is the present Chapter 351. This created problems for the corporations organized under other special codes, because the amalgamation of the two Articles into one Business Corporation Law threatened to inject the new law, Chapter 351, into these other special codes in a way and to an extent it had never been before. The General Assembly did not want this to happen and adopted Section 351.690, and particularly subparagraph (3) in order to make sure that it would not. This was pointed out in the article by Cowherd, supra, where, immediately after stating that the 1943 Act was intended to limit the revision to manufacturing and business corporations which would ordinarily come under Article 6 of the old law, the author said, l. c. 94:

> "It will be found, however, that even this limited revision created problems as to these excepted corporations [i. e., covered by other specific codes such as the railroad code] by reason of the fact * * * that article 1 of the old law supplemented the special codes of these excepted corporations, and the changes made by the Act in this general law necessarily affected all these special codes to a greater or lesser extent. *To limit the scope and effect of the Act* to [sic] certain of these special types of corporations it is provided in sub-paragraph (c) of Section 171 (now Section 351.690 (3)) that:"

followed by the text of said subparagraph.

Thus it must be emphasized that Section 351.690 (3) is, as its language quoted below clearly states, intended to be a section specifically limiting and restricting the effect of the new Business Corporation Law upon the existing codes applicable to specific types of corporations other than manufacturing and business corporations.

Section 351.690, to the extent pertinent here, reads as follows:

"**Applicability of this chapter to existing corporations.**—The provisions of this chapter shall be applicable to existing corporations as follows:

"(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

• • •

"(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, cooperative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3)."

It will be noted that if any of the provisions of Chapter 351 are to apply to railroad corporations, it must be pursuant to Paragraph (3) of Section 351.690, and that in order to apply, such provision must "supplement" the ex-

isting laws applicable to railroad corporations, i.e., Chapters 388 and 389, and must not be "inconsistent with, or in conflict with the purposes of," or "in derogation or limitation of," such laws.

(c) **The original consolidation provisions of Chapter 351.**

When this Chapter 351 was originally enacted and until July 18, 1961, Section 351.415, which was the only section in Chapter 351 authorizing consolidations of corporations, provided as follows:

> "Any two or more domestic corporations *formed for a purpose for which a corporation may be formed under this chapter* and any domestic corporation or corporations and foreign corporation or corporations *formed for a purpose for which a corporation might be formed under this chapter* may consolidate into a new corporation in the following manner: * * *"

Thus, the authority to consolidate was limited to corporations, domestic and/or foreign corporations "formed for a purpose for which a corporation might be formed under this chapter."

But Section 351.020 specifically excluded railroad corporations from those which might be organized under Chapter 351. It read as follows:

> "**What corporations may be organized under this law.**—Corporations for profit *except* banking, insurance, *railroad corporations*, building and loan associations, savings banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies, and exposition companies may be organized under this chapter for any lawful purpose or purposes."

Therefore, it is safe to say that from 1943 until July 18, 1961, the date of the amendments discussed below, the

Missouri General Assembly not only did not intend the consolidation provisions of Chapter 351 to be used as the authority for the merger or consolidation of railroad corporations, but specifically prohibited such use.

Without attempting to discuss the pertinent statutes back to 1866 in detail, which for the convenience of the Court are set forth in the Appendix, the same situation at all times prevailed. To the extent that the Missouri Statutes authorized the consolidation of manufacturing and business corporations they were, by express statutory provisions, restricted so that they could not possibly have applied to railroad corporations, either domestic or foreign.

Therefore, until July 18, 1961, if and to the extent that Chapter 388 did not constitute the applicable State law with respect to the consolidation of railroad corporations, domestic and/or foreign, there was no applicable State law, and the authority for any consolidation of Missouri railroad corporations not found in Chapter 388 did not exist prior to 1940, and from 1940 on had to be found in the Interstate Commerce Act, and, more specifically, Sections 5 (2) and 5 (11).

(d) **The amendment of 1961—Section 351.458.**

Shortly after the enactment of the Business Corporation Law in 1943 the Constitution of 1945 was adopted and, for that reason, among others, the Missouri Bar realized that certain amendments to that Act were required. As pointed out in an article in the University of Kansas City Law Review: [37]

"The Missouri Bar, through its special committee on private corporations, sponsored a bill in the Sixty-

[37] *Fizzell, The 1946 Amendments to the Corporation Code of Missouri,* 15 U. Kan. City L. Rev. 19 (1947).

third Assembly to amend The General and Business Corporation Act of Missouri, enacted in 1943. The bill was duly passed and approved and became effective on October 6, 1946."

The amendments added by this Act are of no particular significance here, but after discussing the twelve sections which had been amended, the author continued, l. c. 23-24:

> "A number of suggestions have been made as to additional amendments to the Corporation Code. Such proposed amendments include the following * * *
>
> "5. Rewrite the merger provisions (Sections 66 to 71, inclusive) so as to authorize expressly the merger of a Missouri corporation and a foreign corporation under the charter of the foreign corporation."

As will appear more specifically below, the reason why it was necessary to rewrite the merger (and consolidation) provisions so as to authorize the merger or consolidation of a Missouri corporation into a foreign corporation, with the foreign corporation as the survivor, was that the definition of the word "corporation" in the Act expressly excluded foreign corporations; and because of this the Secretary of State of Missouri had taken the position that in any merger or consolidation the Missouri corporation should be the survivor.

Although this suggestion for the rewriting of the merger provisions of the Act had been made some time prior to October 1946, it was not carried into effect until 1961. In the interval the Corporations Committee of the Missouri Bar worked toward preparing and having introduced and enacted a bill amending the Business Corporation Law in a number of respects, which bill was introduced in 1959, but did not pass.[38] The Committee

[38] Journal of the Missouri Bar, November, 1958, 426; Journal of the Missouri Bar, October 1959, 437.

continued its work, and caused the bill to be reintroduced in 1961, when it passed and became effective July 18 1961.[39]

As had been suggested many years before, this bill finally rewrote the merger (and consolidation) provisions of the Business Corporation Law so as expressly to authorize the merger (and consolidation) of a Missouri corporation and a foreign corporation under the charter of the foreign corporation. This was done by adding a new Section 351.458, which was enacted solely for that purpose.

In an address delivered before the Annual Meeting of the Missouri Bar in Kansas City on September 22, 1961,[40] the changes in the Business Corporation Law made by this bill were explained, in the course of which the purpose and effect of Section 351.458 was stated as follows:

> "The next change permits a Missouri corporation to merge into a foreign corporation. Many such mergers have occurred under prior law. Prior law provided that any domestic corporation and any foreign corporation could merge into one of such corporations. This is seemingly unambiguous until one realizes that the Act defines the word corporation so as to exclude foreign corporations. Narrowly interpreted prior law meant that a merger of a domestic and foreign corporation was permissible so long as the Missouri corporation was the survivor. The Corporation Department in the Office of the Secretary of State of Missouri has consistently permitted the merger of a Missouri corporation into a foreign corporation provided that the foreign corporation first qualified to transact business in Missouri. In

[39] Journal of the Missouri Bar, December 1960, p. 543; Journal of the Missouri Bar, December 1961, p. 515; *Laws of Missouri, 1961*, p. 248.

[40] Journal of the Missouri Bar, February 1962, pp. 93-94.

the few situations in which the surviving corporation did not propose to transact business in Missouri this was a burdensome requirement but certainly justified under the language of the prior law. The amended section sets forth the procedure to be followed where a Missouri corporation and a foreign corporation merge or consolidate. The Missouri corporation must comply with the Missouri law regarding mergers and the foreign corporation must comply with the law of its state of incorporation. If the foreign corporation is the survivor, and if it proposes to transact business in this state, it must first qualify as a foreign corporation. Whether or not it so qualifies, it must file with the Secretary of State of Missouri an agreement to be bound by the provisions of our corporation law which permit shareholders objecting to a merger to have their shares appraised and paid for; and it must also file an agreement irrevocably appointing the Secretary of State of Missouri its agent to accept service of process in any proceeding based upon an action against the absorbed Missouri corporation arising prior to the merger.'"

This is the Section upon which petitioners rely and must rely as being the sole authority for the proposed consolidation of a Missouri railroad corporation, organized under the provisions of Chapter 388, and a federally chartered corporation into a Delaware corporation.

Thus, petitioners must contend that when the Missouri Bar drafted, the General Assembly enacted, and the Governor approved, a bill amending the Business Corporation Law expressly designed merely to permit the merger of a Missouri business corporation into a foreign corporation, they inadvertently, so to speak, amended Chapter 388 so as to authorize a Missouri railroad corporation and a

federally chartered railroad corporation to consolidate into a Delaware corporation, when, they say, no such authority was previously given by Chapter 388. We submit that no such result was either contemplated or consummated.

(e) **Section 351.458.**

Section 351.458, the section added in 1961, and the only section in Chapter 351 which, by any stretch of the imagination, could be deemed to apply to the proposed plan of consolidation, reads as follows:

> "**Section 351.458. Merger or consolidation with foreign corporation—procedure.**—1. One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized;
>
> "(1) Each domestic corporation shall comply with the provisions of this chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.
>
> "(2) If the surviving or new corporation, as the case may be, is to be governed by the laws of any state other than this state, it shall comply with the provisions of this chapter with respect to foreign corporations if it is to do business in this state, and regardless of whether or not it is to do business in this state it shall file with the secretary of state of this state:
>
> "(a) an agreement that it will promptly pay to the dissenting shareholders of any domestic corporation which is a party to the merger or consolidation the amount, if any, to which they shall be entitled under

provisions of this chapter with respect to the rights of dissenting shareholders, and

"(b) an agreement that it may be served with process in this state, and an irrevocable appointment of the secretary of state of this state as its agent to accept service of process, in any proceeding based upon any cause of action against any such domestic corporation arising in this state prior to the issuance of the certificate of merger or the certificate of consolidation by the secretary of state of this state, and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation.

"2. The effect of the merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, except, if the surviving or new corporation is to be governed by the laws of any state other than this state, to the extent that the laws of the other state shall otherwise provide.

"3. If the surviving or new corporation is to be governed by the laws of any state other than this state, the secretary of state of this state may nevertheless in his discretion issue a certificate of merger or certificate of consolidation in the manner provided in section 351.435. If such a certificate is issued a certified copy thereof, with a copy of the articles of merger or consolidation affixed thereto by the secretary of state, shall be filed for record by the surviving or new corporation in the office of the recorder of deeds of each county or city in which the registered office of each domestic corporation involved in the merger or consolidation is situated."

We submit that this section does not "supplement" the provisions of Chapter 388 discussed above, but is inconsistent with, is in direct conflict with the purposes of, and

is in derogation or limitation of such provisions of Chapter 388. Hence, pursuant to Section 351.690 (3), it is not applicable to railroad corporations.

If the language in the opening paragraph is to be construed as going beyond the purpose for which the bill was drafted, introduced and enacted, and as applying to all kinds and types of corporations, without limitation, including railroad corporations, then it must be construed as undertaking to authorize the merger or consolidation of a railroad corporation with any other railroad corporation without regard to the effect upon competition (in violation of Section 388.290) and without regard to the requirements of an end-to-end connection.

In Subparagraph (1) of Paragraph 1 of Section 351.458, it is provided that

> "Each domestic corporation shall comply with the provisions of this chapter with respect to the merger or consolidation, as the case may be, of domestic corporations * * *."

Section 351.420 of Chapter 351 provides that the plan of merger or consolidation of domestic corporations shall be submitted to a vote at a meeting of shareholders. This is inconsistent with and in conflict with the purposes of the provisions of Section 388.290 of Chapter 388, which provides, in the alternative, that the assent of the required majority of the stockholders of a railroad corporation may be given in writing without the necessity of a meeting.

Section 351.420 further provides that notice of the meeting of shareholders "shall be given as provided in section 351.230." Section 351.230 provides for written or printed notice "delivered or given not less than 10 or more than 50 days from the date of the meeting" and a published notice "the first insertion to be not less than 10 days

prior to the date of the meeting." But Section 388.290 and Section 388.300 and Article XI, Section 10 of the Constitution of 1945 all require 60 days' published notice and no written or printed notice.

Section 351.230 also provides that the published notice shall be in a "newspaper published in the city or county where the registered office of the corporation is located." But the "registered office" referred to is merely the office of the registered agent and the place where process may be served,[41] and it is expressly provided that the registered office of the corporation "may be, but need not be, the same as its place of business."[42]

On the other hand, Section 388.290 requires published notice to be in a "newspaper printed in the county where the general offices of said company or companies of this state are situated."

Subparagraph (2) of Paragraph 1 of Section 351.458 provides that if the surviving or new corporation is to be a foreign corporation, it must file with the Secretary of State an agreement to pay dissenting shareholders of any domestic corporation the amount, if any, to which they shall be entitled under the provisions of the chapter. But Section 388.290 gives dissenting shareholders no appraisal rights, and hence if Section 351.458, coupled with Section 3[illegible] 455, purports to give such rights to the shareholders of a domestic railroad corporation consolidating as provided in Section 388.290, it would clearly be inconsistent with, in conflict with the purposes of, and in derogation or limitation of Section 388.290.

Other minor inconsistencies between the provisions of Chapters 351 and 388 might be cited; but perhaps the

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[41] Section 351.380.

[42] Section 351.370.

most glaring one is the inconsistency between Section 351.425, which requires for the approval of a plan of consolidation "the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote", whereas Sections 388.290, 388.300 and 388.340 require only a majority vote. Furthermore, for nearly one hundred years, Missouri has never required more than a simple majority vote for any of the transactions covered by said sections 388.290 and 388.300. We submit that in this respect the provisions of Chapter 351 do not supplement the existing laws applicable to railroad corporations, but are inconsistent with, in conflict with the purposes of, and are in derogation and limitation of such existing laws.

As further indication that the General Assembly of the State of Missouri did not construe the provisions of Chapter 351, other than those referred to in Paragraph (1) of Section 351.690, as applying to railroad corporations, we call the Court's attention to Section 388.220. Before 1945, but after the adoption in 1943 of the Business Corporation Law, there were no provisions in the chapter (now 388) of the Missouri Statutes dealing with railroad corporations providing generally for the amendment of articles of incorporation, but only a section relating to the issuance of preferred stock. There was, of course, such a provision authorizing the amendment of articles in the Business Corporation Law. In 1945 the General Assembly of the State of Missouri amended the laws relating to railroad corporations by striking out the old section dealing with the issuance of preferred stock and enacted what is now Section 388.220[43] giving broad authority to railroad corporations to amend their charters, the first subsection of which is copied verbatim from the corresponding provision in the Business Corporation Law. If that law, pursuant to Section 351.690 (3), was deemed

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[43] *Laws of Missouri, 1945*, p. 686.

to supplement and be applicable to the laws relating to railroad corporations, there was no necessity for the General Assembly to enact as a part of the code relating to railroad corporations what was already in the code applicable to general and business corporations.

Accordingly, we submit that prior to July 18, 1961, the merger and consolidation provisions of Chapter 351, and of its predecessors as far back as 1870, were not applicable to railroad corporations; that if and to the extent that the provisions of Chapter 388, and its predecessors, did not apply, and if the public policy of the State to require no more than a majority vote for the approval of any kind of consolidation of railroad companies and railroad lines is not to be considered as the applicable State law recognized by Section 5 (11), then there was no applicable law in the State of Missouri dealing with a plan of consolidation such as the one proposed here; and that the amendment effective July 18, 1961, to the Business Corporation Law whereby Section 351.458 was added was not intended to apply and should not be construed as applying to a plan of consolidation of railroad companies.

VIII.

Even if the Business Corporation Law be construed as the State law applicable to the proposed plan of consolidation, nevertheless Section 351.270 of said chapter refers only to charter provisions calling for a greater proportionate or percentage vote than that required by the several specific sections of Chapter 351, and not to charter provisions providing for class voting where none is required by Chapter 351.

Petitioners contend, and must contend, that even if the authority for the proposed plan of consolidation is to be found in Section 351.458, that Section 351.425, providing that the plan of consolidation "shall be approved upon

receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote" is not the controlling section of Chapter 351. Instead they contend, and must contend, that Section 351.270, engrafts class voting upon Chapter 351 where that chapter is silent and supersedes the explicit provisions of Section 351.425. Section 351.270 reads as follows:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrences of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

It was copied verbatim from the corresponding section of the Illinois Business Corporation Act of 1933 (now Section 157.146 of the Illinois Revised Statutes 1965), except for the addition of the last two words—"this section". We have been unable to determine why these two words were added, nor can we suggest precisely what they mean unless the word "section" was inadvertently used instead of the word "chapter", and even this revision would not add much to the meaning. As written it applies only to requirements greater in proportion, i. e., larger in percentage or amount than the requirements of "this chapter" which refers, of course, to Chapter 351.

But, in order to sustain petitioners' contention, it must be construed as if it read, with the italicized words inserted, as follows:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, *or require the vote or concurrence of the holders of the shares of any class or*

series thereof voting separately as a class or series even though no such class vote with respect to such action is required by this chapter, the provisions of the articles of incorporation shall control this section."

But the difficulty with respect to petitioners' contention is that the words in italics are not in the section. And an examination of the context in which the Illinois and the Missouri sections were written will, we submit, demonstrate that it was never intended that the Missouri section be construed as petitioners contend, and as it must be construed if petitioners are to prevail in their claim of a right to a separate class vote on the proposed plan of consolidation.

The Business Corporation Law of Missouri was copied in large part from, and followed very closely, the Illinois Business Corporation Act of 1933, of which said Section 157.146 is a part.[44]

The Illinois Business Corporation Act specifically provided in Section 157.64 for class voting on the approval by shareholders of mergers and consolidations. When the Missouri General Assembly in 1943 enacted its Business Corporation Law it copied, in Section 351.425, this section of the Illinois Act verbatim down to the provision for class voting, but stopped there and eliminated in its entirety the requirement of class voting on mergers and consolidations. Likewise, the Illinois Act specifically provided in Section 157.72 for class voting upon a sale of all or substantially all of the assets of the corporation, other than in the ordinary course of business. When the Missouri General Assembly in 1943 enacted the corresponding provision, Section 351.400, it expressly excluded any provision for class voting. Again the Illinois Act specifically provided in Section 157.53 for class voting on any and

[44] See Commentary on Missouri General and Business Corporations, page 299, Vol. 17, Vernon's Annotated Missouri Statutes (1952 Edition).

all amendments to the articles of incorporation, but when the Missouri General Assembly in 1943 enacted the corresponding provision, Section 351.090, it expressly limited class voting to amendments of the articles adversely altering or changing the preferences, priorities, special rights or powers given to any class by the articles, and permitted all other amendments to be adopted upon receiving a majority vote of the outstanding shares. When Illinois adopted its Section 157.146 the other sections of its Business Corporation Act specifically provided for class voting as indicated: When Missouri copied that section, now 351.270 with the addition of the two words "this section", it at the same time expressly refused to require class voting on mergers and consolidations, as well as in the other transactions mentioned. Yet petitioners would construe Section 351.270 as if the Missouri General Assembly, having expressly refused to require a class vote on mergers and consolidations, had, inadvertently, by enacting Section 351.270, required such a class vote whenever the articles of incorporation so provide.

Section 157.146 of the Illinois Act has been incorporated verbatim, and without the two words "this section" added by Missouri in Section 351.270, into the Model Business Corporation Act as Section 136 thereof, and has been adopted verbatim in many different states. While we find no court decision construing any of these precise sections, we do find the commentators and text writers, with one exception, unanimously construing the Illinois and Missouri sections, the section in the Model Business Corporation Act, and identical or similar sections in other states as permitting greater voting requirements, larger in number or percentage, and not different in kind. In addition, we cite the only court decision which we have been able to find which touches upon this question.

Commencing with Missouri, in his text on *Missouri Corporation Law*, Pearcy says, page 631, with respect to the section, now 351.270:

"For cross-references on *statutory majorities required by this Act*, see p. 212; also p. 660 et seq.

Comment.

"*Greater majorities* than that provided by the statute may be lawfully required by the Articles of Incorporation, but provision for a lesser number than the statutory requirement will not be valid."

It will be noted that the writer, after referring to "statutory majorities required by this Act" then construes this section as authorizing "Greater majorities than that provided by the statute," but says nothing whatsoever about a different or separate class vote being required by the articles of incorporation where none is provided by the statute.

In *The Illinois Business Corporation Act Annotated, 1947 Edition*, prepared by the draftsmen of the Act, referring to the corresponding Section 146, it is said, l. c. 458:

"The provisions of the act specifying the *proportion* of shareholder vote necessary for various types of action furnish merely minimum requirements. The provisions of Section 146 make it possible to require, for any action by shareholders, the vote or concurrence of holders of a *greater, but not a smaller, portion* of the total number of shares, or of any class or series thereof, than is *required by the provisions of the Act.*"

Certainly the draftsmen of the Act did not construe this section as requiring a class or series vote when none is required by any other section of the Act itself. The articles of incorporation could hardly require the vote or concurrence of a "smaller" portion of the votes of any class or series than is required by the provision of the Act if the Act contains no requirement for a class or series vote with respect to the particular action.

As previously stated, this section eventually, in 1950, became Section 136 of the Model Business Corporation Act sponsored by the Section of Corporation, Banking and Business Law of the American Bar Association. The *Model Business Act Annotated,* edited by the Committee on Corporate Laws, Leonard D. Adkins, Chairman of the Section of Corporation, Banking and Business Law of the American Bar Association, was prepared and published as a Research Project of the American Bar Foundation. In Volume 2, at page 763, the Comment with respect to said section reads, in part, as follows:

> "In the absence of a statute such as the Model Act, it has been held that *specific statutory requirements as to the percentage of shareholders* required to vote for a particular transaction could not be changed either upward or downward by provisions of the articles or by-laws or otherwise, on the theory that the public policy was expressed in the statute. Statutes like section 136 of the Model Act make it clear that the articles of incorporation may require the vote or assent of a *larger percentage* of the shares than might otherwise be *prescribed by statute.* Section 136 does not contemplate that the articles may provide for a *lower percentage,* as do the statutes of a few jurisdictions.
>
> "*Higher percentage requirements* for shareholders' action are frequently desired in closely held corporations in order to protect a minority shareholder against adverse joint action by other shareholders. However, there may be reasons to increase such *statutory percentages* in case of publicly held corporations, particularly where special protection is desired for a particular class of shares."

Again note that language found in Section 136 of the Model Business Corporation Act, identical with that of Missouri's section 351.270 except for the omission of the

concluding words "this section", is not construed as engrafting a class voting requirement upon the Model Act in situations where there is no statutory requirement for a class vote. Instead it is interpreted as permitting only increases, not decreases, in the percentages where percentages are prescribed by other sections of the Act.

It is interesting to note that the draftsmen of the Model Business Corporation Act in 1950 even changed the caption of this section from the earlier form reading "Voting Requirements of Articles of Incorporation" to the simpler and more specific form "*Greater* Voting Requirements", thereby emphasizing the fact that this section deals with numbers rather than with classes.

This Section 136 of the Model Business Corporation Act has been adopted, verbatim, in many different States. Some of the interpretations of this section by annotators and text writers follows:

In the *Iowa Code Annotated,*[45] the Comment with respect to the corresponding Section 496A.138 is as follows:

> "The Model Act allows articles of incorporation to *increase* the vote or proportion of shares required for action by shareholders. An important change was made in Iowa by allowing a *decrease.* The Iowa Business Corporation Act provision has no exceptions. Therefore, although Section 496A.70, for example, requires a two-thirds vote to adopt a merger, Section 496A.138 would control and the articles could provide that a smaller proportion would be sufficient for adoption of a merger.
>
> "*Increasing the percentage* required would in effect give a minority a more easily exercised power of veto over proposed action and thus might be particularly desired in closely held corporations. The old law has no comparable provision."

[45] Title 19, page 222.

There is not the slightest suggestion in this Comment that the section permits the articles of incorporation to require a separate class vote where none is otherwise required by statute.

In Texas, the corresponding section is found in *V. A. T. S. Business Corporation Act*,[46] where the "Comment of Bar Committee" with respect to such article reads as follows:

> "The present article (Article 9.08) has much wider application. It applies not only to actions by the shareholders for which *the Act requires a simple majority* of the shares represented at a meeting at which a quorum is present, but also to those special acts of the shareholders for which *the Act requires a vote greater than a majority*. Thus, Article 4.02 A (3) requires a two-thirds vote of the total outstanding shares in order to amend the articles of incorporation, and Article 5.03 B requires a four-fifths vote of all outstanding shares for the approval of a proposed merger or consolidation. By virtue of the present article (Article 9.08), a unanimous vote of all outstanding shares may be required in order to take such actions. The effectiveness of a by-law, on the other hand, will be limited to the area in which Article 2.28 applies."

It will be noted that this section is construed as authorizing only increases in the voting requirements of the Business Corporation Act, with no suggestion whatsoever that it authorizes a separate class vote where none is called for in the Act.

In Virginia the corresponding section is found in Section 13.1-33 of the *Virginia Stock Corporation Act, Laws of 1956*, Chapter 428. In an article on the Virginia Cor-

[46] Article 9.08.

poration Law of 1956,[47] the writer, George D. Gibson, says, with respect to this section:

> "An important provision expressly permits a charter to require the vote of any particular *proportion* of stockholders, though greater than the *proportion required by the act.*"

Thus the writer construes the section as providing only for an increase in the proportion of votes required by the Act and not as authorizing any requirement in the articles for a separate class vote.

When another writer, Frank D. Emerson, in an article entitled "Vital Weaknesses in the New Virginia Stock Corporation Law and the Model Act,"[48] criticized this section because it would permit two-thirds of the stockholders of a Virginia corporation to vote to amend a charter so as to require the unanimous vote of stockholders for any particular act, he was answered in an article by A. J. G. Priest, entitled "The Annual Survey of Virginia Law,"[49] which said:

> "While the wording of Section 13.1-33 which permits articles of incorporation to require a *larger* vote for corporate action than *that specified by the statute,* might be strengthened, it is difficult to follow Mr. Emerson's argument that this provision might make for corporate tyranny."

Once more we find an interpretation of the section as permitting the articles to require a larger vote than the vote specified in the statute, but not as permitting the articles to require a class vote where none is specified by the statute.

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[47] 42 *Va. L. Rev.* 445, 463.

[48] 42 *Va. L. Rev.* 489.

[49] 42 *Va. Law Rev.* 989.

An extended discussion of the purpose and effect of this and similar sections will be found in *O'Neal on Close Corporations.* In Volume 1, Chapter IV,[50] the writer refers to and describes such provisions, including specifically Section 136 of the Model Business Corporation Act, as "Charter clauses requiring *high votes*", or "Charter provisions requiring a *high vote* for shareholder action", or "statutory provisions permitting a *high vote* requirement for specified shareholder action", or simply as "*high vote* requirements". Never does he interpret such sections as requiring or authorizing class voting as such.

The only court decision we have been able to find which touches upon this question is that in the case of *Sellers v. Joseph Bancroft & Sons Co.*, 23 Del. Ch. 13, 2 A.2d 108. The Delaware statute,[51] authorizes the inclusion in a certificate of incorporation of "Provisions requiring for any corporate action the vote of a larger proportion of the stock or of any class thereof than is required by this chapter." Although the words are not precisely the same as that of Section 351.270, they are, for present purposes, identical in substance. The Court said of this section, l. c. 112:

> "When the class of stock is thus segregated into a voting group, the statute * * * prescribes the rule of majority voting for ascertainment of the group judgment. But [this Section] provides that the certificate of incorporation may require for any corporate action the vote of a *larger proportion* of the stock or any class thereof *than is required by any other provisions of the act.*"

Section 351.270 is not a provision *requiring* class voting and, as pointed out below, under Section 5 (11) of the Interstate Commerce Act only a majority vote is needed

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[50] See particularly §§ 4.09, 4.11, 4.12, 4.14, 4.15, 4.18, 4.19, 4.20 and 4.21.

[51] § 102 (4) of the General Corporation Law of Delaware.

unless a larger vote is "required" by a Missouri statute. All that it does is to authorize a charter provision for a greater proportionate or percentage vote than that required by the several specific sections of Chapter 351, not Chapter 388, where the applicable section requires a vote of "at least" a specified percentage. It must be read in connection with the specific sections of the chapter to which it applies.

For example, Section 351.400 (3) requires the vote of "at least three-fourths of the outstanding shares" to authorize the disposition of substantially all assets of the corporation. Section 351.270 would permit the articles of incorporation to require a greater percentage, say 80% or 90%, and this would not be inconsistent with or nullify the statutory requirement of "at least" a three-fourths vote.

Similarly, Section 351.425 provides that a plan of merger or consolidation must receive the affirmative vote of "at least two-thirds of the outstanding shares." Section 351.270 permits a requirement higher than "at least two-thirds" and provides that this shall not be inconsistent with or nullify the two-thirds provision of the merger-consolidation statute.

By contrast, the various subsections of Section 351.090 relating to the creation or increase of preferred shares spell out in detail class voting which is required under differing circumstances. Here, where class votes are required by statute, Section 351.270 authorizes a higher percentage vote of any class than would otherwise be required and provides that if the Articles of Incorporation so specify, such higher percentages must concur in order to accomplish the desired change. But so construed, 351.270 does not nullify the statute or create any inconsistency with it.

On the other hand, this does not mean that Section 351.270 engrafts class voting provisions in cases where

the statute, such as 351.425, expressly provides for the approval of a plan of merger or consolidation upon receiving the requisite percentage of "the outstanding shares entitled to vote."

In confirmation of this proposition it might be noted that Section 351.430 provides that the articles of merger or consolidation shall simply set forth "the number of shares voted for and against" the plan, without making any provision for reporting a class vote; and in the form of Articles of Merger set out in Section 653 of *Peterson and Eckhardt's Missouri Practice, Volume 6,* drawn to comply with Section 351.430, provision is made for the reporting only of the total number of shares voted for and against the plan, with no provision for reporting a class vote. On the other hand, Section 351.095 requires that Certificates of Amendment of Articles of Incorporation shall set out specifically not only the number of shares voted for and against the amendment, but "if the shares of any class are entitled to vote thereon as a class, the number of shares of each such class voted for and against such amendment, respectively." Likewise, the form of Certificate of Amendment of Articles of Incorporation set forth in Section 652 of *Peterson and Eckhardt's Missouri Practice* specifically provides for the reporting of class votes if the shares of any class are entitled to vote on the amendment.

Petitioners made the point below (Alleghany Br. p. 35) that our construction of Section 351.270 makes reference to a "series" vote in the section meaningless, and that the Legislature must have intended to engraft charter provisions for "series" voting on to Chapter 351, which contains no provision for a "series" vote for any stockholder action. But petitioners overlook the fact that the Missouri General Assembly not only did not provide for series voting any place in Chapter 351, but in Section 351.180, the only section authorizing the issuance of shares of stock of any class in series, expressly limited the re-

spects in which shares of a particular series might vary from those of any or all other series, and did not authorize a corporation to provide for any differences in the voting rights of different series of the same class of stock.

We respectfully submit that Section 351.270 refers only to charter provisions calling for a greater proportionate or percentage vote than that required by the several specific sections of Chapter 351, and not to charter provisions providing for class voting where none is required by Chapter 351.

IX.

Section 5 (11) of the Interstate Commerce Act, which is plenary and exclusive and requires only a majority vote, defers only to State statutory law and not to charter provisions which are merely permitted under State statutory law.

Section 5 (11), which by its very terms is "exclusive and plenary" and requires only a majority vote for the approval of a consolidation or merger of railroad corporations, defers only to the different vote, if any, which may be "required under applicable State law". For the moment, two words in the quoted phrase are of particular significance.

First, the word "law", which, as used in such phrase, would appear to be used in the same sense as that in which the words "laws" and "law" are used later on in the same section in the phrase

> "they are relieved from the operation of the anti-trust *laws* and of all other restrictions, limitations and prohibitions of *law*, Federal, State or municipal"

and as the word "laws" is used in the concluding phrase of the section "under the *laws* of any State". It is the public policy of the States to which Congress is deferring, and that public policy is expressed in the statutory laws of a State, not in the provisions of a private contract

between stockholders. In the case of *Shapiro v. Tropicana Lanes, Inc.*, 371 S. W. 2d 237 (Mo. 1963), the contention was made that

> "The corporation and its modes and attributes are not products of private contract. They are products of the state defined by statute under constitutional authorization."

The Missouri Supreme Court rejected this contention saying, l. c. 241:

> "We do not agree. Business corporations are the product of private contract."

Similarly, our Missouri Supreme Court, en banc, was called upon in the case of *State v. Missouri Public Service Co.*, 352 Mo. 29, 175 S. W. 2d 857 (Mo. 1943), to define the term "prescribed by law" as used in the Missouri Constitution. The Court said, l. c. 36:

> "The italicized phrase '*prescribed by law*', by the weight of authority means, prescribed by *statute* law" (Emphasis the Court's).

As for the word "required", there can be little question as to its meaning. If authority be needed it may be found in the case of *In re Boyd*, 213 Fed. 774 (2d Cir. 1914), where the Court of Appeals for the Second Circuit, interpreting a provision of the Federal Bankruptcy Statute, said, l. c. 775-776:

> "The words 'require' and 'permit' express different ideas; in the ordinary use of the English language the one does not include the other. Presumably Congress knew what these words meant and used them to express such meaning."

Presumably when Congress wrote the phrase "required by State law" into Section 5 (11) it still knew what each of the two words meant and used the word "required" advisedly.

The legislative history, purpose and effect of Section 5 (11) is discussed at some length in the brief filed herein by Respondent Missouri Pacific, to which reference is hereby made.

X.

Section 5 (11) of the Interstate Commerce Act, which only provides that the "number" required by applicable State law shall assent to a plan of merger or consolidation, should not be construed as deferring to a State law requiring a class vote on a plan of consolidation of railroad companies.

Bearing in mind the fact that it was the purpose of the Congress in enacting Section 5 (11) of the Interstate Commerce Act to "facilitate," to make less difficult and less complicated, mergers and consolidations of railroad corporations, the word "number" as used in the section is of particular significance. It explains what is meant by the word "different" in referring to the different vote required under applicable State law. The word "different" refers back to the word "majority" and means, therefore, different from a majority—different in quantity or size, not different in kind or character. This is confirmed by the fact that if a different vote is required by applicable State law, the section does not provide that such "different vote as may be so required shall assent," but, instead, says merely that the "number" so required shall assent. And the word "number" cannot be construed as synonymous with "separate class vote."

To read into the word "number" the additional requirement of a class vote is a forced construction of the section, and one which will make mergers and consolidations more difficult to accomplish, precisely contrary to the purpose for which the section was enacted. If the Congress had intended to carry into Section 5 (11) the special burden of a class vote it would have done so in the plain language it used in Section 20b of the Interstate

Commerce Act, and again in 11 U. S. C. 205. Once more the proper construction to be given to Section 5 (11) is being discussed more fully in the brief filed herein by Respondent Missouri Pacific, to which reference is hereby made.

CONCLUSION.

We submit that, in spite of petitioners' efforts in the District Court, in the Court of Appeals and in this Court, and for whatever reason, to inject into the case an issue as to the alleged unfairness of the proposed plan, there was but one basic issue decided by the District Court and presented on the appeal, i. e., whether or not the holders of the Class B stock of the Missouri Pacific are entitled to vote separately and as a class on the approval of any plan of consolidation of the Missouri Pacific with or into any other railroad corporation. All other questions that have been raised are incidental to this single issue.

In order to be successful on this issue and to have the judgment of the District Court upheld, petitioners must be sustained on each of six separate propositions:

(1) That Missouri Pacific's Articles call for such class vote; (2) that Chapter 388 is not the applicable State law; (3) that Chapter 351 is the applicable State law; (4) that Section 351.270 makes the class voting provisions, if any, of such Articles controlling; (5) that Section 5 (11) defers to provisions in articles which are permitted but not required under applicable State law; and (6) that Section 5 (11) defers to any applicable State law requiring a class vote on a plan of consolidation.

The Court of Appeals ruled, and correctly, against petitioners on propositions (1), (4) and (5) and did not reach (6), which should also be ruled against them. The Court of Appeals erred in ruling (2) that Chapter 388 was not applicable and (3) that Chapter 351 was. We submit

that instead of being sustained on each of the six propositions, as they must be if they are to be entitled to the class vote which they seek, the decision should be against petitioners on each of them.

For the reasons stated we urge that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

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I. **Missouri Constitution of 1945:**

Article XI, Section 10, Consolidation of domestic with foreign railroad corporations—jurisdiction of Missouri Courts—notice of consolidation.—If any railroad corporation organized under the laws of this state shall consolidate by sale or otherwise, with any railroad corporation organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place. No consolidation shall take place, except upon at least sixty days public notice to all stockholders, in the manner provided by law.

II. **Chapter 351, Missouri Revised Statutes, 1959 (the General Business and Corporation Act):**

(a) **§ 351.230. Notices of shareholders' meetings.**—1. Written or printed notice of each meeting of shareholders stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, in addition to a published notice as in sub-section 3 of this section provided shall be delivered or given not less than ten or more than fifty days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officer or persons calling the meeting to each shareholder of record entitled to vote at such meeting.

2. Any notice of a shareholders' meeting sent by mail shall be deemed to be delivered when deposited in the United States mail with postage thereon prepaid addressed to the shareholder at his address as it appears on the records of the corporation.

3. Any corporation, in addition to the written or printed notice provided for in subsection 1, shall publish the required notice in a daily or weekly newspaper published in the city or county where the registered office of the corporation is located, the first insertion to be not less than ten days prior to the date of the meeting, and if such notice be published in a weekly newspaper, such notice shall be published at least twice, and if such notice be published in a daily newspaper, such notice shall be published at least nine times. Such published notice need not contain a statement of the purpose or purposes of any meeting.

4. Attendance of a shareholder at any meeting shall constitute a waiver of notice of such meeting except where a shareholder attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

(b) § 351.370. **Registered office and registered agent.**— 1. Each corporation shall have and continuously maintain in this state:

(1) A registered office which may be, but need not be, the same as its place of business;

(2) A registered agent, which agent may be either an individual, resident in this state, whose business office is identical with such registered office, or a corporation authorized to transact business in this state having a business office identical with such registered office.

2. The address, including street and number, if any, of the initial registered office, and the name of the initial registered agent of each corporation organized under this chapter shall be stated in its articles of incorporation.

(c) § 351.380. **Process served on registered agent.**—1. The registered agent so appointed by a corporation shall be an agent of such corporation upon whom any process,

notice, or demand required or permitted by law to be served upon a corporation may be served. In the event that a corporation shall fail to appoint or maintain a registered agent in this state, then the secretary of state as long as such default exists shall be automatically appointed as an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served. Service on the secretary of state of any process, notice or demand against a corporation shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, a copy of such process, notice or demand. In the event that any process, notice, or demand is served on the secretary of state, he shall immediately cause a copy thereof to be forwarded by registered mail, addressed to the corporation at its registered office in this state.

2. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

3. The secretary of state shall keep a record of all processes, notices, and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

III. Act of March 2, 1869, Laws of Missouri, 1869, p. 75:

An Act to authorize the consolidation of Railroad Companies in this State with companies owning connecting railroads in adjoining States.

Section:

1. Railroad companies authorized to consolidate with connecting roads.

2. Consolidation to be approved by majority of stockholders.

3. Change of name and exchange of stock; exceptions to consolidation.

4. Obligations and liabilities of consolidated company.

5. Act, when to take effect.

Section 1. That any railroad company organized under the general or special laws of this state, whose track shall at the line of the state connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations, as may be mutually agreed between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed.

Sec. 2. Such consolidation shall not be made, however, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated, at some meeting called expressly for that purpose, or by the approval of the same by the holders of the same amount of stock in each of said companies, in writing, and signed by them.

Sec. 3. When the terms of said consolidation shall have been agreed upon, as above stated, and approved in one or the other of the modes above set forth, it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the com-

pany, which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement and the resolutions of consolidations, and the name adopted for the new company, shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company; **provided**, that whenever at any place on the line of this state, two or more railroads in this state are competing for the business, to or from any railroad in an adjoining state, and a consolidation of either of such competing roads, with the road in an adjoining state, would diminish or prevent such competition, then, and in such case, consolidation shall not be permitted under this act, and in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads, on fair and reasonable terms; and the same may be enforced by appropriate legislation; **and provided further**, that the state reserves to itself the right to guarantee to any road that may hereafter be built to any such point, the right to make a fair contract for the transportation of freight and passengers, with such consolidated road, and in case any such railroad company shall consolidate, or attempt to consolidate with a connecting road, contrary to the provisions of this act, any person or party aggrieved, may bring action against them, in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise.

Sec. 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of

the company within this state, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place.

Sec. 5. This act shall take effect and be in force from and after its passage.

IV. **Act of March 25, 1870, Laws of Missouri, 1870, p. 24:**

An Act in relation to Corporations and Companies.

Section 1. Any two corporations or companies now existing under general or special laws, or which may be hereafter created whose objects and business are in general of the same nature, may amalgamate, unite and consolidate said corporations or companies and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises and property belonging to each, and under such corporate name as they may adopt or agree upon; such consolidation shall be made by agreement in writing by or under the authority of the board of directors, and the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies; and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the Secretary of State; **provided**, no such consolidation shall in any manner affect or impair the rights of any creditors of either of said corporations or companies; **and provided further**, that companies or corporations so consolidating shall accept the provisions of this act. Such agreement may provide for the number of directors of said corporations or companies, not exceeding thirteen.

Sec. 2. All the property and effects of such consolidated company shall be liable to be taxed as other property in this State, any provision in the charter of any of said companies to the contrary notwithstanding.

Sec. 3. The provisions of this act shall apply only to companies and corporations organized or created solely for manufacturing purposes.

Sec. 4. This act shall take effect from its passage.

V. Act of March 26, 1881, Laws of Missouri, 1881, p. 75:

An Act to amend Section seven hundred and ninety, Chapter 21, Article 2 of the Revised Statutes of the State of Missouri, entitled "Railroad Companies."

Section 1. Extending rights to railroads of "any" State, instead of "adjoining" States.

* * * * * * *

Section 1. Section seven hundred and ninety of the Revised Statutes of the State of Missouri, is hereby amended by striking out the words "an adjoining," in the twenty-first line of said section, and inserting in lieu thereof the word "any," and such section, as so amended, shall read as follows, viz.: Sec. 790. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the State, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the State, may extend into the adjoining State, and for that purpose may build, buy, lease or consolidate in the manner provided in the preceding section, with any railroads in such adjoining State, and operate the same, and may own such real estate and other property in such

adjoining State as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other State, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms as may be agreed upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of any State of the United States, may extend, construct, maintain and operate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations, as fully as if incorporated in this State: **Provided**, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected, until a meeting of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sub-let, consolidated, or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, sixty days public notice thereof having been previously given, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company, shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary

of State: **And provided further**, that if a railroad company of another State shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same, as provided in this act, or shall extend its railroad into this State, or through this State, such part of said railroad as is within this State, shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State; and a corporation in this State leasing its road to a corporation of another State shall remain liable as if it operated the road itself; and a corporation of another State being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all cases and for the same causes, and in the same manner, as a corporation of this State might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another State being the lessee as aforesaid, or extending its railroad as aforesaid into or through this State, shall establish and maintain an office or offices in this State, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this State.

VI. **Revised Statutes of Missouri, 1919, Section 10151.**

§ 10151. May incorporate for what purposes.—Corporations may be created under this article for any of the following purposes:

First—To carry on any kind of mining, mechanical, chemical, manufacturing, smelting, printing, coal oil or petroleum business.

Second—To encourage and promote agriculture and the improvement of stock, and for these purposes, may establish fair grounds.

Third—To construct toll bridges.

Fourth—To erect hotels, halls, markethouses, warehouses, exchange and other buildings, and for the purpose of purchasing, owning and renting buildings already erected.

Fifth—To build wharves, docks, grain elevators, levees, and to construct canals and embankments for the reclaiming of lands.

Sixth—To convey and transport persons and freights on land or water by any mode of conveyance whatever.

Seventh—To construct and operate horse railroads.

Eight—To purchase and use fire engines, hose, hooks and ladders, and all other apparatus necessary or useful to prevent and extinguish fires.

Ninth—To supply any town, city, district, neighborhood or village with gas or water.

Tenth—To establish steam or other ferries.

Eleventh—for any other purpose intended for pecuniary profit or gain not otherwise especially provided for, and not inconsistent with the Constitution and laws of this state: **Provided**, that nothing in this section shall be construed to authorize the incorporation of a bond investment company or association to issue bonds or debentures based upon payments upon the installment plans, nor any company which savors of the character of a trust company, bank, saving fund, building and loan or fiduciary company.

VII. **Act of April 1, 1921, Laws of Missouri, 1921, p. 267:**

Corporations, Private: Relating to Consolidation of Certain Corporations.

An Act to repeal section 10167 of the Revised Statutes of the state of Missouri for the year 1919, relating to the

consolidation of corporations and to enact a new section in lieu thereof, to read as follows:

Section 1. Repealing section 10167 and enacting new section.—That section 10167 of the Revised Statutes of the state of Missouri for the year 1919, is hereby repealed and a new section to be known as section 10167 enacted in lieu thereof:

Sec. 10167. Two preceding sections, application of.—The provisions of the two last preceding sections shall apply only to private corporations organized for some or all of the purposes permitted to "manufacturing and business corporations" by subdivisions first, second, fourth, fifth and eleventh of section 10151 of the Revised Statutes of the state of Missouri for the year 1919.

VIII. **Illinois Business Corporation Act of 1933:**

(a) 157.64. § 64. Approval by shareholders. At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations, unless any class of shares of any of such corporations is entitled to vote as a class in respect thereof in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares of each such class of shares entitled to vote as a class in respect thereof and of the total outstanding shares entitled to vote at such meeting.

(b) 157.72. § 72. Sale, lease, exchange, or mortgage of assets, other than in usual and regular course of business: * * *

(c) At such meeting the shareholders may authorize such sale, lease, exchange, mortgage, pledge, or other disposition and fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, unless any class of shares is entitled to vote as a class in respect thereof, in which event such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class of shares entitled to vote as a class in respect thereof and of the total outstanding shares entitled to vote at such meeting.